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# information

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## Summary

R. Stonehouse, P. Kafantaris, K. Fuller and A. Botic, *employees*, Canada Post Corporation, *employer*, and Canadian Union of Postal Workers, *interested party*.

Board File: 950-304  
CLRB/CCRT Decision no. 1144  
April 23, 1996

Referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

The complainants, part-time mail service couriers, exercised their right to refuse work when Canada Post substituted smaller window vans for the traditional step vans. According to the complainants, the use of the smaller vans would require improper lifting techniques when loading, unloading and rearranging bags of mail inside the van and would thereby put them at risk of injury.

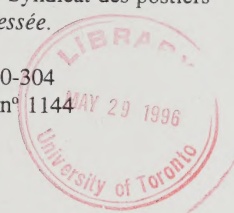
## Résumé

R. Stonehouse, P. Kafantaris, K. Fuller et A. Botic, *employés*, Société canadienne des postes, *employeur*, et le Syndicat des postiers du Canada, *partie intéressée*.

Dossier du Conseil: 950-304  
CLRB/CCRT Décision n° 1144  
le 23 avril 1996

Renvoi d'une décision d'un agent de sécurité fondé sur le paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Les plaignants, des courriers des services postaux qui travaillent à temps partiel, ont exercé leur droit de refuser de travailler lorsque la Société des Postes a remplacé les fourgonnettes traditionnelles à marchepied par de plus petites fourgonnettes vitrées. Les plaignants allèguent qu'avec ces petites fourgonnettes, ils ne pourraient exécuter les bons mouvements pour soulever les sacs au moment du chargement et déchargement ou pour les replacer dans la fourgonnette, et qu'ils risqueraient ainsi de se blesser.



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The safety officer declared that the force exerted in moving the bags was not sufficient to conclude that the required tasks could not be performed safely. He was also satisfied that repetition in these tasks did not warrant a conclusion that the task was unsafe. The Board confirms the safety officer's finding that the performance of the tasks in question does not present a danger within the meaning of the Code. The evidence does not show that on the day of their refusal, the complainants faced a hazard or condition that could reasonably be expected to cause injury or illness. And, in any case, the perceived hazards could have been corrected if the workers had co-operated with management in the examination of the issue.

L'agent de sécurité a déclaré que la force exigée pour déplacer les sacs n'était pas assez grande pour conclure que les tâches ne pouvaient être accomplies en toute sécurité. Il était également convaincu que l'aspect répétitif de ces tâches ne permettait pas de conclure qu'elles étaient dangereuses. Le Conseil confirme la décision de l'agent selon laquelle l'exécution des tâches en cause ne constitue pas un danger au sens où l'entend le Code. Rien dans les éléments de preuve ne montre que le jour du refus, les plaignants étaient exposés à une situation ou un danger qui aurait pu vraisemblablement causer une blessure ou une maladie. De toute façon, les risques perçus auraient pu être corrigés si les travailleurs avaient collaboré avec la gestion lors de l'examen de la question.

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## Reasons for decision

R. Stonehouse, P. Kafantaris,  
K. Fuller and A. Botic

*employees,*

*and*

Canada Post Corporation,

*employer.*

Canadian Union of Postal Workers

*interested party.*

Board File: 950-304  
CLRB/CCRT Decision no. 1144  
April 23, 1996

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The Board was composed of Ms. Sarah E. FitzGerald, Member, sitting alone pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing took place at Toronto, Ontario on October 18, 19 and 30, 1995, November 8, 1995 and January 22 and 23, 1996.

### Appearances

Mr. Bernard A. Hanson, counsel, accompanied by employees Ken Fuller, Robert Stonehouse and Allen Botic, and CUPW representatives Mr. Gerry Deveau CUPW National Director (S. Ont. District) and Mr. Mike Duquette, CUPW (Scarborough Local);

Mr. Harold L. Doherty, counsel for Canada Post Corporation, accompanied by Mr. John Den Bok, Manager, OHS & E, Mr. Yvon Paquette, Manager, Occupational Safety, Mr. Louis Laflamme, Ergonomic Specialist and Ms. Susan Postill, Student-in-Law for the employer, Canada Post Corporation; and

Mr. Paul Vidlak, Labour Affairs Officer, Human Resources Development Canada (Labour Programs).

### **Preliminary Matters**

These reasons for decision deal with requests by four employees that safety officer Paul Vidlak refer his finding to the Board, pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). Mr. Vidlak, Labour Affairs Officer, Human Resources Development Canada (Labour Programs) was called to Canada Post Corporation's Depot 3 (Willowdale) the morning of February 6, 1995. He investigated the work refusals of four part-time Mail Service Couriers ("MSCs"). He concluded that Canada Post Corporation's substitution of vehicles known as Window Vans in the place of the Step Vans normally used by these MSCs was "not unsafe".

The four work refusals arose from the same set of circumstances on the same day and were the subject of a single investigation and report by the safety officer. The Board handled the four referrals as a single matter for hearing purposes. The hearing itself was delayed several months. Shortly before the hearing dates set in May 1995, the Canadian Union of Postal Workers ("CUPW") wrote to advise the Board that it would present the case on behalf of the MSCs, and that due to an internal miscommunication, counsel was not available on the designated dates. Canada Post Corporation ("CPC" or "the Employer") agreed to an adjournment and new dates were set for July 1995. Subsequently and unavoidably, the safety officer could not attend. The next dates available to all parties and the Board were in October 1995. A week before the October hearing, counsel for the MSCs forwarded an ergonomics assessment study to the Board and the Employer, advising of an intention to rely upon it. The study, requested by CUPW, was based on information gathered by an ergonomics consultant in the presence of Employer and CUPW representatives during a visit to the work site on September 8, 1995. The Employer had agreed to the report being put into evidence, subject to sufficient time to prepare for cross-examination.

The introduction of the report into evidence, and the time required to prepare for and conduct cross-examination lengthened the proceedings considerably.

Three of the named MSCs gave evidence at the hearing. The fourth, Mr. Paul Kafantaris, did not appear on any of the hearing dates. Counsel for the MSCs initially advised of difficulty in contacting Mr. Kafantaris, and at the hearing on November 8, 1995, advised simply that Mr. Kafantaris had decided not to participate. The Board concludes from these remarks that Mr. Kafantaris has abandoned all interest in his individual request for referral of the safety officer's decision.

### **The Work Refusals**

On the morning of Monday, February 6, 1995, four of seven MSCs at CPC's Depot 3 (Willowdale) refused to work. The four employees, all part-time MSCs, claimed in effect, that the Employer's substitution of Window Vans for Step Vans constituted a "danger" to them within the meaning of the Code. As Messrs. Stonehouse and Botic stated in their Refusal to Work Registration forms, they were concerned that use of the smaller Window Van to do their work would require improper lifting techniques. Of specific concern to them, was lifting in a stooped (bent) body position.

For purposes of this decision MSC work can be described generally as the loading and arranging of bags of mail within the delivery vehicle, the unloading and drop-off or delivery of the bags at designated stops along routes, and the pick-up of mail and its return to and unloading at the Depot.

The Window Vans in issue are much like the ordinary vans one sees in use by courier and delivery companies in city centres. Only the driver and passenger seats are retained. The rest of the van's interior forms the cargo compartment. The Window Van has a side and rear set of doors, and the usual vehicle bumper at the back. An MSC cannot stand up inside such a van.

The Step Vans are similar to the old fashioned milk truck. The driver climbs up a set of steps into the driver's seat. The interior of the van is much bigger, and allows the MSC to stand up and move about freely in the van. The passenger seat is removed, and a set of steps allows the MSC to exit "curbside" onto the sidewalk while carrying bags of mail in an upright position. A single large door at the back is pushed up or pulled down. There is a walk-up step at the back of the van.

The MSCs say that as a result, in loading and unloading, and rearranging bags of mail within the Window Van, they cannot apply the lifting practices taught to them that guard against injury. For example: "bend at the knee" rather than "lift with the back", and, if turning while carrying a load, "twist with the feet" rather than "twist at the waist". The MSCs say that the improper lifting required in using a Window Van puts them at risk of injury.

The Refusal to Work Registration form signed by Mr. Fuller described a more general complaint. He did not want to drive a Window Van to do a day's work "in place of [a] proper Step Van". In his view, the Window Van is completely unsuited to MSC work. The day of the work refusals he acted as informal spokesman for the MSCs in discussing various concerns with safety officer Vidlak. In addition to concerns about improper lifting, Mr. Fuller advised the safety officer that:

\* Use of the smaller Window Van (less floor space) could lead to "stacking" of mail bags in the cargo compartment. This was particularly so if (as suggested by management to alleviate concerns about improper lifting), the heavier bags were broken down into smaller bags, thus creating more bags. If the MSC had to brake suddenly while driving, a bag of mail on the top layer could fly towards the driver's head. The Window Vans unlike CPC Step Vans, were not equipped with a protective grill or cage behind the driver's head.

\* The hand cart that some MSCs use to make heavy deliveries at route stops might also shift inside the van with sudden braking. The Window Vans unlike CPC Step Vans, did not contain a system for restraining a hand cart.

\* MSCs using Window Vans might have to, depending on the route, frequently exit onto busy streets. The CPC Window Vans did not permit the MSC curbside access.

### **The Safety Officer's Investigation**

Mr. Vidlak believed that the work refusals were exercised in connection with the loading of Window Vans. His investigation focused on that particular activity. He conducted his investigation in the presence of management and union personnel, including health & safety representatives. Each of the four MSCs joined the investigation group upon returning from alternate duties to which they had been assigned. Mr. Vidlak recalls Mr. Fuller's discussion of concerns about shifting bags and hand carts within a moving vehicle, and exiting onto busy streets. He did not include these additional matters in his written report.

Mr. Vidlak reviewed his investigation and report for the Board. To assess the risk of injury in loading bags of mail he considered factors of posture, force and repetition. CPC management told him that if mail bags were too heavy, they could be broken down into smaller bags. Mr. Vidlak accepted this to be true, and from comments of the MSCs, he concluded that the specific weight of the mail bags was not a factor in their refusal. He concentrated therefore, on the lifting procedure used in loading the bags.

As to posture, Mr. Vidlak concluded that an MSC on the loading dock could, using safe lifting practices, deposit mail bags just inside the rear of the cargo compartment of a Window Van backed up to the loading dock. He believed, although he did not see such a demonstration, that an MSC moving to the side door of the Window Van,

could relocate bags inside the van from the rear to a point just behind the driver's seat, without any lifting in the stooped position of concern.

The safety officer concluded that the force exerted in loading the bags was not sufficient to conclude that the loading task could not be performed safely. Although he did not know the exact number or weight of mail bags that had been set out for each MSC that morning, he was satisfied that repetition in the loading task did not warrant a conclusion that the task was unsafe either. He believed that any cumulative increase in risk of injury due to repetition could be addressed by adjusting the weight of the bags.

Responding to questions from counsel, Mr. Vidlak agreed that if the loading of Window Vans could not be done without lifting in a stooped position, this might have led to a different approach in his investigation. The Board viewed a representative Window Van in the presence of the parties and Mr. Vidlak. Given the distance between the rear and side doors it is clear that to relocate bags from the rear to the front, an MSC would have to lean well in or climb in on hands and knees. Mr. Vidlak was satisfied though, that even if climbing into the van might require a stooped posture, the subsequent dragging of bags from the rear to the front of the van could be safely accomplished, without lifting in a stooped or squatting position. Mr. Vidlak maintains his conclusion that MSC concerns were in the circumstances, issues of "comfort" rather than "safety".

Following his February 6, 1995 investigation and decision, the safety officer did ask Bill St.-Germaine, a CPC Health & Safety officer, to take the matter of MSC use of Window Vans to the joint labour-management health & safety committee. Minutes of a February 15, 1995 meeting of the local committee indicate the matter was discussed and a list of suggestions generated to make the task of loading and unloading Window Vans easier.

### **Argument Advanced by the MSCs**

To support the claim that there was "danger" within the meaning of the Code, the MSCs advanced the following proposition. Weight of mail bags is an important factor in assessing the risk of injury in loading Window Vans. The MSCs say they did not advise Mr. Vidlak, nor did they understand that he was of the view on the day of the work refusal, that weight was not an important factor. The MSCs were concerned about posture and weight. Lifting in a stooped position requires flexion of the lumbar spine, which increases the risk of musculoskeletal injury. At certain mail bag weights, the risk of injury from such flexion amounts to a "danger" within the meaning of the Code.

### **Evidence of Dr. Geoff Wright**

Dr. Wright, an ergonomics consultant, prepared a report based on information gathered during his September 8, 1995 site visit. Dr. Wright provides ergonomic consulting services to both employers and unions. His expertise in the design of work environments for human use, including adaptations for injured employees returning to work is unquestioned. While his expertise cannot be said to specifically lie in assessing what legally constitutes "danger" within the meaning of Part II of the Code, he is certainly qualified to assess risks of injury. It is of interest that as Chief of the Safety Studies Service of Ontario's Ministry of Labour in the period 1979 - 1983 he provided technical support to provincial safety officers in their investigations.

Dr. Wright describes his background and training in terms of occupational ergonomics; "a multi-disciplinary approach to the science of people at work". Its goal is to fit the job to the worker, not the worker to the job. Dr. Wright's passion for the prevention of workplace illness and injury was clear to the Board.

Dr. Wright's site measurements included the weight of bags being loaded into Step Vans and Window Vans that day, and videotaping of loading procedures. The bag

weights were assumed by all to be typical of what an MSC could encounter on any given work day. Bag weights are determined by the amount of mail the Letter Carrier inside the Depot places into each bag. The bags are then set aside for the MSC to pick-up, load and deliver.

To everyone's surprise, one of the large mail-drop bags that Mr. Botic was loading into a Step Van weighed 119 pounds.

Dr. Wright's report extends to matters beyond the loading of Window Vans. The report analyzes a number of MSC functions that are performed regardless of the type of Van used. A comparison is also made of the risks of injury associated with Window Van versus Step Van use. Such a comparison may be useful to CUPW and CPC in consultations or other proceedings. However, the Board's interest in the report lies in its connection to the question before the Board. That is, does the report demonstrate, contrary to the safety officer's conclusion, that use of the Window Vans on February 6, 1995 did constitute a "danger"? More specifically, and applying the section 122 definition of "danger", did use of Window Vans constitute:

*"a hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition could be corrected"?*

The report states two major conclusions:

1. loading large or heavy bags of mail creates a risk of musculoskeletal injury to the backs of some workers, and
2. the work that the Employer is asking the MSCs to do, will lead to musculoskeletal injury to the backs of some MSCs, and is therefore, unsafe.

Unfortunately, Dr. Wright's study proved of little assistance to the Board's specific inquiry. Dr. Wright explained that his conclusions were based on his biomechanical analysis of the loading task rather than his analysis of psychophysical criteria such as task duration and frequency. In conducting the biomechanical analysis, Dr. Wright asked himself the question: "What would my concerns be if there were no Step Vans available at all?". He then proceeded through computer-modelling (Michigan 2D model and Vision 3000 software) to apply the heaviest bag weights discovered being loaded into Step Vans, to selected postures captured in the videotape of an MSC loading a Window Van. This approach assumes that MSCs would load the same bag weights into Window Vans as Step Vans.

The use of weight data obtained on a day other than the day of the work refusal, and its application to selected "freeze frames" captured in filming Window Van loading by an MSC (other than one of the four named MSCs) is not without its evidentiary challenges. Further, the analysis method applied the heaviest Step Van bag weights (119 and 86 pounds) to postures adopted by someone lifting a much lighter bag. Also, the typical or average weight of the heavier Step Van bags was not identified. Yet Dr. Wright's report states at p. 13, that "large drop bags are also loaded into the Window Vans, but not nearly as frequently as for the Step Vans. Typically these bags are only lighter and half full" (my emphasis).

At the hearing, it became clear that Dr. Wright had not been advised that pursuant to Article 33.12 of the collective agreement, an MSC cannot be required to lift bags of mail weighing more than 55 pounds. MSCs using the walk-in Step Vans often exercise their discretion to lift bags of heavier weight, and do so safely and without injury. However, any MSC loading a Step or Window Van may request that Letter Carriers inside the Depot break a bag of mail down into two or more smaller bags.

Consequently, the assumption that MSCs load the same weights of mail bags into Window Vans as Step Vans does not stand up to scrutiny. Dr. Wright acknowledges that in observing Step Van and Window Van loading the day of his site visit, he saw

nothing leading him to believe any immediate injury would occur. However, had MSCs attempted to load the heavier drop bags (119 or 86 pounds) into the Window Van, he thinks he would have intervened to stop them.

During a break in his cross-examination, Dr. Wright reconducted the biomechanical analysis using an assumed 55 pound bag weight. Of the nine videoframe postures previously selected to demonstrate the loading of a Window Van, the computer model predicted in respect of one, that the force that may occur at the L5/S1 joint (fifth lumbar, first sacral) exceeded what can be described here as the "Design Limit".

The MSCs rely on this finding as evidence of "danger" in performing their work. It is necessary therefore to briefly address this contention. Based on the body type and gender of the MSC in the videoframe, the applicable Design Limit was 770 pounds of force. The force that the computer model predicted may occur at the L5/S1 joint was 771 pounds, 1 pound above the Design Limit.

The Board has considered the wording of the descriptions (p. B-9 of the report) of the forces falling within categories that I will describe simply as 1) Below the Design Limit, 2) Between the Design Limit and Upper Limit, and 3) Above the Upper Limit. The Board notes also that a single description is applied to the full range of numerical values falling within each category. The Board is not satisfied that a force value of 771 pounds that the computer predicts may occur if a 55 pound bag of mail is lifted by an MSC of the body type and posture demonstrated by an MSC who is lifting what may in fact be a lighter bag, establishes that the MSCs that refused to work on February 6, 1995 faced a "danger" within the meaning of s. 122 of the Code.

### **The Human Factor**

The Board has no doubt that the reaction of the MSCs to the substitution of Window Vans bore a direct connection to the manner in which CPC management implemented the change. For MSCs, the vehicles are the tools of their trade. Apparently without

consulting CUPW or at least at the Scarborough Local level, and certainly without any notice to the MSCs directly affected, CPC implemented what appeared to the MSCs to be a permanent change in vehicle type.

The Board heard no evidence to suggest that Depot 3 management gave any advance consideration to the effect the substitution might have on the performance of MSC duties -- comfort or otherwise. Management's refusal or inability to provide concrete answers to MSC questions concerning the reason for the substitution and whether it would be permanent, aggravated the situation. It is perhaps not surprising that the MSCs persisted in their work refusal, despite management's suggestion that if the deliveries were made that day, the use of Window Vans would be re-examined for the following day.

Discussions between the MSCs and Depot 3 management appear to have reached a point that day, where any response from management other than an immediate return to use of Step Vans was unacceptable to the MSCs. For example, in response to the management's suggestion that the heavier bags could be broken down into smaller bags, one MSC was of the view that a stooped lift with any weight at all put MSCs at an unacceptable risk of injury. Management's suggestion that appropriate care should be exercised if exiting onto busy streets was not satisfactory either.

Even at the hearing, the MSCs showed an unwillingness to consider possible solutions to their expressed concerns. The Board does not mean to imply that suggestions from the Employer after the fact would excuse a failure to address a situation of danger, if one existed, at the time of the work refusal. Rather, the attitude displayed by the MSCs at the hearing simply confirmed the Board's opinion based on evidence of discussions the day of the work refusals, that the only solution the MSCs would accept was a return to the Step Vans. The MSCs continued to advance this position at the hearing by way of remedy, in the event the Board agreed there was a "danger". They take this position even though Dr. Wright acknowledges that he is not entirely

opposed to the Window Vans and feels they could be modified to ensure the work can be performed safely.

### **Finding**

The evidence does not show that on February 6, 1995, the MSCs in question faced a hazard or condition that could reasonably be expected to cause injury or illness. See on this point: David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686) and Pierre Guénette (1988), 74 di 93 (CLRB no. 696). The Board concludes in any event that had the MSCs been willing to explore and implement suggestions made by management that morning, the hazards or conditions perceived to be dangerous could have been attended to such that they could not reasonably have been expected to cause injury before management had re-examined, as it offered to do, the issues associated with the use of Window Vans at Depot 3.

In response to certain evidence presented to the Board, the Board accepts that substitution of the Window Van may increase the time required by MSCs to complete their duties. Nationally developed time standards attach time values to each MSC function. The values were calculated on the basis of Step Van use, which permits walk-in loading and unloading, and curbside access in making deliveries. The Board anticipates that, depending on the extent of measures an MSC adopts to personally ensure loading and unloading of the Window Van without injury, the time required to complete the duties will be further increased.

Whether such increases result in an MSC consistently exceeding the allotted time, and the potential consequences and courses of action are however, all matters covered by the collective agreement which provides for consultative and adjudicative options. The matter is however, not one of "danger" pursuant to the Code. If the issue is treated as a safety concern, CUPW and the Employer have agreed to specific processes which allow for consultation, seeking of expert advice, local agreements and arbitration. The Board is advised that CUPW concerns about MSC use of Window

Vans has not only been placed on the agenda of the local health & safety committee, but that CUPW has sought to have the matter placed on the agenda for discussion by the national health & safety committee.

The Board notes that although satisfied that MSC work can be performed safely using a Window Van, the opportunity or temptation to complete the work in less time than might otherwise be required, by adopting work methods that increase the risk of injury could present itself. A long range perspective on the issue may prove prudent. Modifications to the Window Vans or the work tasks that will reasonably assure the safety of the work to be done might be made, and any appropriate training provided.

The decision of safety officer Vidlak is confirmed.

A handwritten signature in black ink, reading "Sarah E. FitzGerald". The signature is fluid and cursive, with the first name "Sarah" and last name "FitzGerald" clearly legible.

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Sarah E. FitzGerald  
Board Member



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## Summary

Karol Horvath, *complainant*, International Association of Machinists and Aerospace Workers, *respondent*, and Canadian Airlines International Limited, *employer*.

Board File: 745-4798  
CLRB/CCRT Decision no. 1145  
October 30, 1995

## Résumé

Karol Horvath, *plaignant*, Association internationale des machinistes et des travailleurs de l'aérospatiale, *intimée*, et Lignes aériennes Canadien International Ltée, *employeur*.

Dossier du Conseil: 745-4798  
CLRB/CCRT Décision n° 1145  
30 octobre 1995

The complainant alleged that the union breached section 37 of the Canada Labour Code (Part I - Industrial Relations) by acting in a perfunctory manner with respect to his attempt to obtain lay-off status and corresponding pay.

The complainant who held the position of Air Engineer II with Canadian Airlines International Ltd. learned that his lay-off notice was to be sent to him. When he failed to receive the notice, he sought the union's assistance to obtain it. The Chief Shop Steward informed him that the union was negotiating with the company to mitigate the effects of the lay-offs and the proposed lay-offs had been put on hold. He suggested that the complainant take a leave of absence to buy time while making his decision. In the interim, the complainant obtained a position with another company and required confirmation that he had left Canadian Airlines. He then wrote to his supervisor advising him that, if he was not granted lay-off status, his letter constituted a resignation. The human resources officer who is also a shop steward at another lodge suggested he withdraw his letter of resignation. The

Le plaignant allègue que le syndicat a enfreint l'article 37 du Code canadien du travail (Partie I - Relations du travail) en agissant de façon négligente, en ce qui avait trait à sa tentative d'obtenir le statut de mis à pied et l'indemnité correspondante.

Le plaignant, qui occupait le poste de mécanicien d'aéronef II pour les Lignes aériennes Canadien International Ltée, a appris qu'un avis de mise à pied devait lui être envoyé. N'ayant pas reçu cet avis, il a communiqué avec le syndicat pour l'obtenir. Le délégué syndical en chef l'a informé que le syndicat tentait de négocier une entente avec l'employeur pour atténuer les conséquences des mises à pied et que les mises à pied proposées avaient été mises en veilleuse. Il a suggéré au plaignant de prendre congé pour gagner du temps en attendant de prendre une décision. Dans l'intervalle, le plaignant s'est trouvé un emploi au sein d'une autre compagnie et avait besoin d'une confirmation qu'il avait quitté son employeur. Il a ensuite écrit à son superviseur pour l'aviser que, s'il ne recevait pas le statut d'employé mis à pied, sa lettre constituait une lettre de démission. L'agent des relations humaines, qui est

complainant did not do so.

The complainant submitted there was a total lack of representation on the part of the respondent union. While it is true that the union did not attempt to obtain the complainant's lay-off notice for him, its rationale for not doing so is both understandable and justifiable. Any attempt to achieve the complainant's lay-off would run contrary to the union's efforts to reduce the number of lay-offs that were to take place. The Board is also of the view that, before concluding there were no grounds for a grievance, the union was aware of the relevant facts. In addition, the union's decision was not reached in a summary manner. Three officers of the union at different levels were involved before an answer was provided to the complainant.

Although the Board fully understands the quandary in which the complainant found himself when it became evident that his lay-off notice was not forthcoming, he nevertheless voluntarily made a decision to leave his employment without heeding the sound advice given to him. In such circumstances, the union's actions cannot be found to be contrary to section 37 of the Code.

The complaint is dismissed.

délégué syndical d'une autre section locale, a suggéré au plaignant de retirer sa lettre de démission. Le plaignant ne l'a pas fait.

Le plaignant soutient que le syndicat intimé ne l'a pas représenté du tout. Bien qu'il soit vrai que le syndicat n'a pas tenté d'obtenir l'avis de mise à pied pour le plaignant, son raisonnement pour ce faire est compréhensible et justifiable. Toute tentative en vue d'obtenir la mise à pied du plaignant irait à l'encontre des efforts du syndicat pour réduire les mises à pied qui devaient avoir lieu. Le Conseil est également d'avis que, avant de conclure qu'il n'y avait pas lieu de présenter un grief, le syndicat était au courant des faits pertinents. En outre, la décision du syndicat n'a pas été prise de façon sommaire. Trois dirigeants du syndicat à divers niveaux étaient en cause avant qu'une réponse ait été donnée au plaignant.

Même si le Conseil comprend bien le dilemme dans lequel le plaignant se trouvait quand il est devenu évident que son avis de mise à pied n'arrivait pas, le plaignant a tout de même décidé de lui-même de quitter son emploi sans tenir compte des bons conseils qui lui avaient été prodigués. Dans les circonstances, le Conseil ne peut pas juger que les mesures prises par le syndicat allaient à l'encontre de l'article 37 du Code.

La plainte est rejetée.

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LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

## Reasons for decision

Karol Horvath,

*complainant,*

International Association of Machinists and  
Aerospace Workers,

*respondent,*

*and*

Canadian Airlines International Limited,

*employer.*

Board File: 745-4798  
CLRB/CCRT Decision no. 1145  
October 30, 1995

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The Board was composed of Mr. Richard Hornung, Q.C., and Ms. Suzanne Handman, Vice-Chairs, and Mr. François Bastien, Member.

### Appearances

Mr. Michael R. Concister, for the complainant;

Mr. Harold C. Lehrer, accompanied by Mr. Manny McIntyre, Chief Shop Steward and Mr. Brian Tredenick, Shop Steward, for the International Association of Machinists and Aerospace Workers, District Lodge 721; and

Mr. G.H. Devitt, Manager, Labour Relations, for Canadian Airlines International Ltd.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

## I

The applicant, Mr. Karol Horvath, filed a complaint claiming that the respondent union had breached section 37 of the Canada Labour Code by failing to represent him with respect to his alleged lay-off. This section reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

In the present case, the complainant submits that when he became aware of his impending lay-off, he sought the assistance of his union. He maintains that the union acted in a perfunctory manner and gave only superficial consideration to his attempt to obtain lay-off status and corresponding pay. According to Mr. Horvath, such behaviour constitutes a violation of section 37 of the Code. The union denies the allegation. In order to resolve the conflicting versions of the parties, the Board held a hearing. This took place in Montréal on April 13, 1995 and September 11-12, 1995.

## II

Mr. Horvath was hired by Canadian Airlines International Ltd. as a mechanic on February 25, 1980. Following the requisite training, he progressed to the position of Air Engineer I and after a successful bid he was classified as Air Engineer II. His responsibilities in this position, which he held at Mirabel Airport during the period of October to December 1993, included the servicing of Airbus 310 aircraft and certifying their airworthiness.

In April 1993 there had been a reduction of personnel and a displacement of employees. Mr. Horvath became the engineer with the least seniority in the system and faced the possibility of being laid off in the event of further staff reductions. In particular, downsizing at Dorval International Airport would have a direct impact on him.

Discussions amongst the employees during the month of October 1993 frequently centered around lay-offs and bumping. At that time, the complainant and other employees were told by Mr. Lawrence Johnson, Manager, Line Maintenance for the eastern region, that there would be a decrease of staff at Dorval. Later that month, the complainant learned from Mr. Brian Tredenick, the union shop steward at Mirabel, that employees at Dorval would in fact exercise their bumping rights and transfer to Mirabel. If this occurred, Mr. Horvath would be bumped from his position leaving him with a choice of either transferring to a lower position at another location with a loss of revenue of at least \$200.00 per month or accepting lay-off status. Mr. Horvath claimed that it was well known that, because of his spouse's career, he would not be willing to relocate.

In the fall of 1993, Mr. Horvath and another engineer, Mr. Norman Belton, were the only employees at Mirabel licensed to certify the airworthiness of the Airbus 310. At the end of October 1993, two employees from Dorval, with greater seniority classified as Engineer II, whose work primarily involved the servicing of B-747 aircraft, were sent on a costly training program in Vancouver. They were to be trained to certify the airworthiness of the Airbus 310. Given the current cutbacks, Mr. Horvath took this as a signal that he would be bumped by these two engineers and believed his lay-off was imminent.

In the last week of November, the complainant asked his shop steward, Mr. Brian Tredenick, to assist him in tracing his letter of lay-off. On December 3, 1993, Mr. Tredenick called Ms. Jennifer Rowland in Vancouver in the presence of the

complainant. During the conversation, which took place on a speaker phone, Ms. Rowland advised Mr. Tredenick that the complainant's lay-off letter dated December 8, 1993 would be sent in two days' time.

The complainant did not receive the lay-off notice as anticipated. He contacted Mr. Manny McIntyre, Chief Shop Steward of the respondent union, to locate it. Mr. McIntyre told him that his function was to save jobs and not to assist anyone in losing a job.

Mr. Horvath then called Mr. Johnson, Manager, Line Maintenance, as well as Mr. David Perry, Senior Maintenance Supervisor (Mirabel), to help him obtain his letter of lay-off which he maintained existed somewhere within the system. According to the complainant, both managers claimed to know nothing about the letter.

In the interim, given that Mr. Horvath considered he would be laid off in the near future, he sought and obtained a position with Air France. He wanted his lay-off notice in order to be able to proceed with his new employment. On December 10, 1995, the complainant submitted the following letter to his supervisor, Mr. Perry, and left on holiday:

*"Mr. David Perry  
Senior Maintenance Supervisor  
Mirabel International (Airport(YMX))*

*December 10, 1993*

*Dear Mr. Perry:*

*Due to the recent indications of 'bumping' into YMX, as well as recent appointments for the DND line Engineer position in Trenton, Ontario, I respectfully request Lay-off status.*

*This request comes after having carefully sorted out my options, specifically regarding the skepticism, on my part, of my chances for advancement within Canadian Airlines International.*

*I must express my sincere thanks and appreciation for the quality of my work surroundings during my employment with CAI. Unfortunately, extenuating circumstances have forced me to expand my particular horizons.*

*If I am not accorded Lay-off status, for whatever legitimate reason, I will have no option but to consider this letter as an official resignation effective Midnight of December 24, 1993.*

*Sincerely,*

*Karol Horvath"*

(emphasis added)

On or about December 20, 1995, Mr. Horvath met with Ms. Maureen Puddester, the Human Resources Administrator at Dorval, to return his company pass and all documentation. Ms. Puddester, who is also a shop steward at another lodge (local lodge 2309), advised the complainant she had his lay-off letter and reproached him for having resigned. When Mr. Horvath told her he had never received his notice of lay-off, she suggested that he withdraw his December 10th letter of resignation. Mr. Horvath, however, did not do so, considering that his letter was not a letter of resignation but a request for lay-off status.

In the latter part of December, after he unexpectedly received an information package concerning relocation, Mr. Horvath met with Mr. Tredenick and asked him to file a grievance in order to obtain his lay-off notice from the employer. According to Mr. Horvath's testimony, Mr. Tredenick said he would look into the matter and contact Mr. McIntyre. Mr. Horvath claimed he attempted to reach Mr. Tredenick on several occasions. Finally, at the end of January 1994, Mr. Tredenick advised the

complainant that no grievance would be filed on his behalf since he was no longer employed by the company.

### III

During the course of the hearing, evidence was presented with respect to the company's lay-off procedure. Various witnesses stated that initial lay-off letters may be rescinded and examples were provided where such letters had, in fact, been cancelled. In the case of Mr. Horvath, his lay-off notice was not delivered to him since the union was negotiating with the company in an attempt to mitigate the effect of the planned lay-offs. Mr. Johnson explained that he had been approached by Mr. Terry Harrison, President of the local union, to consider providing some of the senior employees with the possibility of resigning or retiring in consideration of a severance package. Following discussions between the local union's president and Ms. Rhona Cole, Director of Labour Relations, an agreement was reached in the latter part of December with respect to the proposed severance package. As a result of this agreement, Mr. Horvath's lay-off did not take place as originally foreseen.

According to the union, Mr. Horvath was aware of these negotiations. Mr. Manny McIntyre, Chief Shop Steward, testified that when Mr. Horvath had come to see him to obtain his lay-off notice, he not only told him about the union's negotiations with the company but also informed him that the lay-offs had been put on hold. He advised the complainant that if he resigned he would not receive lay-off pay and suggested that he take a leave of absence, a means used in the past, to buy time while making a decision. Mr. McIntyre had also discussed the matter with Mr. Tredenick prior to Christmas and informed him of the current negotiations and the complainant's awareness of the situation. Subsequently, during a conversation with Ms. Puddester, Mr. McIntyre was told that Mr. Horvath had resigned.

In December 1993, Mr. Horvath had also expressed to Mr. Tredenick his concern about receiving his lay-off notice by a certain date because of an employment opportunity and said that if he failed to receive this notice, he would have to resign. Mr. Tredenick gave him the same response as Mr. McIntyre; he would not be compensated in such circumstances.

According to Mr. Tredenick, Mr. Horvath first raised the possibility of filing a grievance in January 1994. Mr. Tredenick, being unable to respond, contacted Mr. McIntyre. Following their discussion during which Mr. Tredenick confirmed that the complainant had resigned, Mr. McIntyre sought the advice of Mr. Ray Landry, the Airline General Chairman for district 721, since it was the first time he was faced with a situation in which an employee was seeking lay-off status. Mr. Landry agreed with Mr. McIntyre's view that because Mr. Horvath had resigned from the company, no valid grievance existed. Mr. McIntyre provided this opinion to Mr. Tredenick who in turn advised Mr. Horvath at the end of January 1994 that the issue was not a grievable matter; since he was no longer an employee with the company, there was no possibility of filing a grievance.

#### IV

Counsel for the complainant argued that there was a total lack of representation on the part of the respondent union. Considering the importance of lay-off status and recall rights, counsel submitted that the union should have dealt with his grievance in an in-depth fashion. In his view, the union failed to conduct an investigation and perfunctorily dealt with his grievance by simply concluding that the complainant was no longer an employee. Given the gravity of the grievance, the level of the union's resources, its sophistication and expertise, counsel maintained that in reaching its decision, in the absence of an investigation, the union acted in an arbitrary manner and its conduct was seriously negligent.

The union claimed that it had obtained the necessary facts before reaching its decision and argued that there was no grievable matter involved. Mr. Horvath, having obtained employment with Air France, wanted to force the employer to lay him off before it intended to do so. However, according to the union, he was never laid off; he had voluntarily resigned. There was therefore nothing an arbitrator could give him. In addition, counsel for the union claimed that Mr. Horvath had not followed the advice provided to him. The union also submitted that it was trying to mitigate the lay-offs and in such a situation it could not attempt to accelerate lay-offs.

V

A violation of section 37 will be found only if the union's conduct is determined to be arbitrary, discriminatory, or in bad faith. The scope of a union's duty of fair representation has been set out by the Supreme Court of Canada in the case of Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, as follows:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

*1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

*2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

*3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527)

The complainant, in the present case, has not alleged that the union acted towards him in bad faith, with malice or in a discriminatory manner. His contention is that the union's conduct was arbitrary and seriously negligent. Such conduct is described by the authors Sack and Mitchell as follows:

*"Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to obtain the data to justify a decision; it has also been described as acting on the basis of irrelevant factors of principles, or displaying an attitude which is indifferent and summary, or capricious and non-caring or perfunctory. ...*

...

*The Board has said, however, that there comes a point when mere negligence becomes gross negligence which may be viewed as arbitrary when it reflects a complete disregard for critical consequences. ..."*

(Jeffrey Sack, Q.C., and C. Michael Mitchell, Ontario Labour Relations Board Law and Practice (Toronto: Butterworths, 1985), page 477)

The Board, in the case of Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRBR no. 304), referred to arbitrary or grossly negligent behaviour in the context of prohibited behaviour under section 37:

*"... Union decision makers must not... act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. ...*

*... the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence - it is a total failure to represent (e.g. Forestell and Hall, *supra*). Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake."*

(pages 324-325; 131-132; and 615)

## VI

In this case, in order to conclude that the union acted in an arbitrary and seriously negligent manner, it must be found that it was completely indifferent to the complainant, ignorant of his situation, and based its decision on a whim or its own preferences with no regard to the facts (see Luc Gagnon (1992), 88 di 52 (CLRB no. 939); and Valerie Hertz et al. (1990), 81 di 96; and 90 CLLC 16,055 (CLRB no. 806)).

Following an analysis of the evidence, the Board finds that the behaviour of the union cannot be characterized as such.

While it is true that the union did not attempt to obtain Mr. Horvath's lay-off notice for him, its rationale for not doing so is both understandable and justifiable. The *raison d'être* of a union is to bargain collectively in order to obtain the best terms and conditions of employment it can achieve for the employees it represents and to defend the negotiated rights of these employees. Amongst its functions, as stated by Mr. McIntyre, is that of preserving employment. In this regard, the union through Mr. Terry Harrison was attempting to negotiate a compensation package for the purpose of mitigating the effects of the forthcoming lay-offs. It would run contrary

to the union's efforts to reduce the number of lay-offs that were to take place if, at the same time, the union was demanding that a particular employee be laid off.

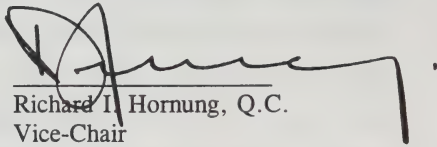
Mr. Horvath contends that the union failed to conduct an investigation before reaching the conclusion that his grievance was not arbitrable and it dealt with his request to file a grievance in a perfunctory manner. The Board does not agree. The union was aware of the relevant facts. Mr. McIntyre knew that the foreseen lay-offs had been put on hold. Having spoken to Ms. Puddester, he was also aware that the complainant had sent a letter in which he clearly states that if not granted lay-off status, he was resigning, effective December 24, 1993. Mr. McIntyre had also discussed the matter with Mr. Tredenick who confirmed that Mr. Horvath had resigned. In these circumstances, the union concluded that there were no grounds for a grievance.

The union's decision was not reached in a summary manner. Three officers of the union at different levels were involved before an answer was provided to the complainant. Both Mr. Tredenick, the Shop Steward, and Mr. McIntyre, the Chief Shop Steward, considered the matter. In view of the unusual circumstances, Mr. McIntyre sought the advice of the union's airline general chairman, Mr. Landry, who confirmed that no valid grievance existed. This was not a situation where an uninformed decision was taken in the absence of any thought or consideration.

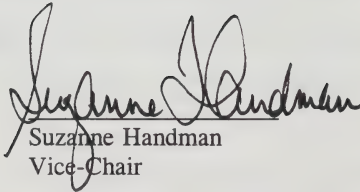
It is clear that Mr. Horvath was in a difficult situation. His future with the employer was precarious and he had a secure position elsewhere. To assume his duties at Air France, he required confirmation that he had left his employment with Canadian Airlines. When it became evident that his lay-off notice was not forthcoming, the union suggested other options in order to buy time, namely withdrawing his resignation letter and obtaining a leave of absence. Mr. Horvath chose neither of the solutions offered. While the Board fully understands the quandary in which Mr. Horvath found himself, he nevertheless voluntarily made a decision to leave his

employment without heeding the sound advice given to him. In such circumstances, the union's actions cannot be found to be contrary to section 37 of the Code.

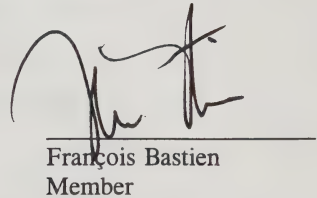
Accordingly, the complaint is dismissed.



Richard I. Hornung, Q.C.  
Vice-Chair



Suzanne Handman  
Vice-Chair



François Bastien  
Member

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## Summary

Teamsters Local Union No. 31, *applicant*, Atomic Transportation System Inc., *respondent*, and Atomic Transportation Employees Association, *interested party*.

Board Files: 530-2216  
530-2232

Teamsters Local Union No. 31, *applicant*, Atomic Transportation System Inc., *employer*, and Atomic Transportation Employees Association, *interested party*.

Board File: 555-3555

CLRB/CCRT Decision no. 1146  
October 30, 1995

(Reconsideration of decision issued in certification file 555-3555)

## Résumé

Section locale 31 du syndicat des Teamsters, *requérante*, Atomic Transportation System Inc., *intimée*, et Atomic Transportation Employees Association, *mis-en-cause*.

Dossiers du Conseil: 530-2216  
530-2232

Section locale 31 du syndicat des Teamsters, *requérante*, Atomic Transportation System Inc., *employeur*, et Atomic Transportation Employees Association, *mis-en-cause*.

Dossier du Conseil: 555-3555

CLRB/CCRT Décision n° 1146  
le 30 octobre 1995

(Réexamen de la décision rendue dans le dossier d'accréditation 555-3555)

This decision is further to the full Board's decision in Atomic Transportation System Inc. (CLRB no. 1137) referring this matter back to the original panel for final determination.

The original panel dismissed an application for certification and that decision was reconsidered by the Board sitting in plenary session (CLRB no. 1064) and returned to the original panel for disposition in accordance with the Board's practice and policy. The Federal Court of Appeal, however, set aside the full Board's decision (and, consequently, the original panel's subsequent decision) because the Board had failed to notify certain employees affected by the application for

Cette décision fait suite à celle du Conseil réuni en séance plénière dans Atomic Transportation System Inc. (CCRT n° 1137) renvoyant l'affaire au banc initial aux fins de décision.

Le banc initial a rejeté la demande d'accréditation et cette décision a été réexaminée par le Conseil siégeant en séance plénière (décision du CCRT n° 1064) et a été renvoyée au banc initial pour qu'il rende une décision en conformité avec les pratiques et la politique du Conseil. La Cour d'appel fédérale a toutefois infirmé la décision du Conseil réuni en séance plénière (et par conséquent la décision du banc initial) parce que le Conseil n'avait pas avisé certains employés de la

reconsideration. On July 17, 1995, after notifying the parties and employees concerned and affording them the opportunity to make representations, the full Board considered the matter again. As in CLRB decision no. 1064, the matter was referred to the original panel for disposition.

Following review and consideration of all of the submissions of the parties and interested employees and all documents in all of the files related to this matter, and particularly those filed since the December 24, 1993 certification order, the original panel found that it was appropriate to certify the applicant and granted the application.

In reaching that decision, the original panel explained that since rendering its decision dismissing the application, it had reconsidered the Board's policy with respect to the "special circumstances" that the Board may invoke to order a vote pursuant to section 29(1). It endorsed the proposition that sound labour relations principles and the encouragement of collective bargaining embodied in the Canada Labour Code require that consistency and reliability be favoured and that to that end, the "special circumstances" invoked to hold a representation vote must be limited to those having a bearing on the reliability of the membership evidence, ascertained as of the date of the filing of the application.

demande de révision. Le 17 juillet 1995, après avoir avisé les parties et les employés visés et leur avoir donné la possibilité de présenter des observations, le Conseil a examiné la question de nouveau. Tout comme dans la décision n° 1064, l'affaire a été renvoyée au banc initial aux fins de décision.

Après examen de toutes les observations des parties et des employés intéressés et de tous les documents dans tous les dossiers liés à cette affaire, et tout particulièrement ceux déposés depuis l'ordonnance d'accréditation du 24 décembre 1993, le banc initial a jugé qu'il y avait lieu d'accréditer le requérant et a accueilli la demande.

En rendant cette décision, le banc initial a expliqué que depuis sa décision initiale, il a réexaminé la politique du Conseil concernant les «circonstances extraordinaires» susceptibles d'être invoquées par le Conseil en vertu du paragraphe 29(1) du Code. Il a souscrit à la proposition voulant que les principes de saines relations du travail et l'encouragement de la négociation collective incorporés dans le Code canadien du travail exigent que la cohérence et la fiabilité soient favorisés et qu'à cette fin les «circonstances extraordinaires» invoquées pour tenir un scrutin de représentation doivent se limiter à celles qui ont une incidence sur la fiabilité de la preuve d'adhésion, constatée à la date de la présentation de la demande.

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## Reasons for decision

Teamsters Local Union No. 31,

*applicant,*

Atomic Transportation System Inc.,

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and

Atomic Transportation Employees Association,

*interested party.*

Board Files: 530-2216  
530-2232

Teamsters Local Union No. 31,

*applicant,*

Atomic Transportation System Inc.,

*employer,*

and

Atomic Transportation Employees Association,

*interested party.*

Board File: 555-3555

CLRB/CCRT Decision no. 1146  
October 30, 1995

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The Board was composed of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair, and Mr. Patrick H. Shafer and Ms. Véronique L. Marleau, Members.

Appearances (on record)

Mr. Don Davies, for the applicant trade union;

Messrs. C. Donald MacKinnon and William B. McAllister, for certain employees;

Mr. Barry Y.F. Dong, for the employer.

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

Further to the full Board's decision in Atomic Transportation System Inc. (October 23, 1995), as yet unreported CLRB decision no. 1137 (hereinafter "Atomic no 2"), referring this matter back to the original panel for disposition in accordance with the Board's practice and policy, the panel of the Board comprised of Jean L. Guilbeault, Q.C./c.r., Vice-Chair, Patrick H. Shafer and Véronique L. Marleau, Members, has met to reconsider the matter.

The material facts of this matter, up until the issuance of the full Board's decision in Atomic no 2, supra, are set out in that decision which, in turn, largely adopts the portrayal of the events set out by the Board in its first full Board decision on the matter (see Atomic Transportation System Inc. (1994), 94 di 48 (CLRB no. 1064) (hereinafter "Atomic no 1")).

For the purposes of the present decision, suffice it to recall that following the full Board's initial decision (see Atomic no 1, supra), on December 24, 1993, we rescinded our decision to order a vote and granted the application, certifying the applicant as bargaining agent for employees in the bargaining unit that we had found to be appropriate for collective bargaining. In accordance with the Board's practice and policy, as set out in Atomic no 1, supra, in ascertaining the membership evidence as of the date of the application, we considered whether there existed special circumstances justifying that a vote be ordered "such as particular raid applications, alleged unfair practices, where it [the Board] suspects that union membership evidence is tainted or irregular, and, very exceptionally, where a considerable amount of time has passed between the date of application and the date of the Board's decision"

(Atomic no 1, supra, page 55). Our review of the file at that time did not indicate that any of these circumstances, all of which relate to the issue of the reliability of the membership evidence, were present at the time of the filing of the application on March 3, 1993.

The Board's failure to give proper notice of the application for reconsideration to the interested employees led to the setting aside of Atomic no 1, supra, and this panel's decision of December 24, 1993, by the Federal Court of Appeal; hence the present reconsideration of our decision of August 20, 1993 maintaining our initial decision of July 5, 1993, further to Atomic no 2, supra.

To reach the present decision, we reviewed all the submissions of the parties and interested employees and all the documents in all the files related to this matter, and particularly those filed since our decision of December 24, 1993. None of the facts alleged in these submissions prompt us to alter the conclusion reached in our decision of December 24, 1993. Nothing in these submissions relates to the events surrounding the filing of the application. Rather, they refer to subsequent events which have no bearing on the determination to be made here and which, as we indicated earlier, must be limited to events relating to the date of the filing of the application for certification. Delay, as the full Board pointed out in Atomic no 2, supra (page 10), is not a matter which we could rely on as a basis for ordering a representation vote because it was not created by the parties, and in particular the applicant, but rather resulted from the Board's own error in failing to give proper notice of the reconsideration. Thus, it would be manifestly unjust to rely on this ground to order a representation vote.

Having said that, however, now that this file has been returned to us for final disposition, we take this opportunity to explain further the reasons that initially made us order a vote pursuant to section 29(1) of the Code when we dealt with this application for the first time on July 5, 1993. We did not state our reasons because we felt that protecting the confidentiality of the employees' wishes was more important than releasing the particulars of our rationale for ordering a vote.

At the time, the panel felt that the special circumstances upon which the Board based its decision to order a vote pursuant to section 29(1), were not necessarily limited to the issue of quality (or reliability) of the membership evidence. The enumeration of the "special circumstances" found in previous Board decisions (see particularly Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no 640)) was not exhaustive. As a result, we felt that they could include the circumstance contemplated here. In our view, it was necessary to ascertain the employees' wishes by way of a vote when the scope of the bargaining unit had been changed for community of interest considerations and the percentage of employees in the newly defined unit that were members of the trade union at the time of the filing of the application, came very close to the 50% threshold under which such a vote is rendered mandatory. This, we felt, raised a reasonable doubt as to whether the unit found appropriate for collective bargaining indeed had the support of a majority of employees in that unit, and the only way to dispel this doubt was to order a vote.

We have since reconsidered the Board's policy with respect to the "special circumstances" that the Board may invoke to order a vote pursuant to section 29(1). We have endorsed the proposition that sound labour relations principles and the encouragement of collective bargaining embodied in the Canada Labour Code require that consistency and reliability be favoured, and we agreed that to that end, the "special circumstances" justifying the ordering of representation vote in applications for certification must be limited to those having a bearing on the reliability of the membership evidence, ascertained as of the date of the filing of the application.

We note in passing that the discussions which took place during the full Board sessions on the issue have led the Board to undertake a study of its notices and their content, with a view to ensuring that they no longer trigger unavailing responses. Evidently, employees recruited by a trade union cannot be deemed to know what "special circumstances" the Board considers for the purpose of deciding whether or

not a representation vote should be ordered, if the Board's notices are silent on the issue.

For the foregoing reasons, as well as those set out by the full Board in Atomic no 1 and Atomic no 2, and in our decision of December 24, 1993, the application for certification filed on March 3, 1993, is granted.



Jean L. Guilbeault, Q.C./c.r.  
Vice-Chair



Patrick H. Shafer  
Board Member



Véronique L. Marleau  
Board Member



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## Summary

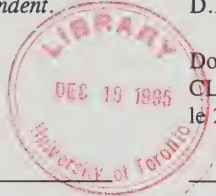
Teamsters Local No. 31, on behalf of Mr. Harjit Sandhu, *complainants*, and D.H.L. International Express Ltd., *respondent*.

Board File: 745-5041  
CLRB/CCRT Decision no. 1147  
November 21, 1995

## Résumé

Section locale 31 du syndicat des Teamsters, au nom de M. Harjit Sandhu, *plaignants*, et D.H.L. International Express Ltd., *intimée*.

Dossier du Conseil: 745-5041  
CLRB/CCRT Décision n° 1147  
le 21 novembre 1995



The Teamsters Local 31 filed a complaint pursuant to section 97(1) of the Code on behalf of Mr. Harjit Sandhu alleging that D.H.L. International Express Ltd. had dismissed Mr. Sandhu because of his union activity.

An employer is not prohibited by the Code from dismissing an employee for legitimate reasons, either before, during or after a union organizing campaign. Although on certain occasions the Board will review the reasons given by the employer for the dismissal to ensure that they are genuine and not a pretext for the firing, the Board's function is not to assess whether the reasons given constitute just cause for dismissal but rather to determine whether or not anti-union animus had any role to play in the same.

The Board concluded that the dismissal of the complainant was unrelated to his union activity and that the decision to dismiss him was taken by the employer without taint of anti-union animus. The complaint was accordingly dismissed.

La section locale 31 du syndicat des Teamsters a déposé, au nom de M. Harjit Sandhu, une plainte en vertu du paragraphe 97(1) du Code, alléguant que D.H.L. International Express Ltd. avait congédié M. Sandhu pour avoir exercé des activités syndicales.

Le Code n'interdit pas à un employeur de congédier un employé pour des raisons valables avant, pendant ou après une campagne de syndicalisation. Même si dans certains cas le Conseil examinera les raisons invoquées par l'employeur pour congédier un employé pour s'assurer que ces raisons sont authentiques et qu'elles ne constituent pas un prétexte, le rôle du Conseil n'est pas d'évaluer si les raisons invoquées constituent un motif valable, mais plutôt de déterminer si un sentiment antisyndical a joué un rôle dans cette décision.

Le Conseil conclut que le congédiement du plaignant n'était pas relié à ses activités syndicales et que la décision de l'employeur n'était pas entachée d'un sentiment antisyndical. La plainte est donc rejetée.

During the course of the hearing, the complainant attempted to introduce surreptitiously recorded conversations between himself and his manager, and between himself and a fellow employee. The Board reviewed previous jurisprudence on the subject of the admissibility of such evidence and discussed the principles which the Board should consider when determining whether or not surreptitiously recorded evidence should be admitted. The Board concluded that, in the circumstances, the recorded evidence proffered was not admissible.

Au cours de l'audience, le plaignant a tenté de présenter comme preuve des enregistrements faits subrepticement de conversations entre lui et son supérieur, ainsi qu'entre lui et un collègue de travail. Le Conseil a passé en revue diverses décisions portant sur l'admissibilité de ce genre de preuve et a exposé les principes dont il tiendrait compte pour décider si des enregistrements clandestins devraient être admis. Il conclut dans les circonstances que les enregistrements produits ne sont pas admissibles.

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## Reasons for decision

Teamsters Local Union no. 31 on behalf of  
Mr. Harjit Sandhu,

*complainants,*

*and*

D.H.L. International Express Limited,

*respondent.*

Board File: 745-5041  
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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Calvin B. Davis and Ms. Mary Rozenberg, Members.

### Appearances

Mr. Morley D. Shortt, Q.C., for the complainants; and  
Mr. Colin Gibson, for the respondent.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

## **I**

The Teamsters Local Union no. 31, (Teamsters or the union), filed a complaint pursuant to section 97(1) of the Code on behalf of Mr. Harjit Sandhu alleging that D.H.L. International Express Ltd. (D.H.L. or the employer), dismissed Sandhu from his employment because of his union activity.

## II

Mr. Sandhu began his employment with D.H.L. in November 1991 as a warehouseman and worked continuously, on a part-time basis, until his termination. At the time of his termination he was the most senior part-time employee at the site.

In early 1994, the employer became aware of a serious problem with couriered goods warehoused at its facility in Vancouver. Certain "high-tech" items such as cellular phones, computers, computer software, as well as video hardware and software, began disappearing from its premises. After extensive analysis, the employer concluded that the items all went missing on the Saturday or Sunday shift when three specific employees, Messrs. Sandhu, Ball, and Gill, were working either alone or in combination with each other or Paul Hebten.

The employer consulted with the RCMP in May 1994 and as a result, officers interviewed the individuals who regularly worked the weekend shift. The theft problem abated from that time until early fall 1994 when it began to re-occur both on the weekends and during the week. Again, according to the employer, the same combination of employees remained suspect because of their attendance at the workplace when the disappearances of goods occurred.

As might be expected, the disappearance of couriered goods caused not only financial loss to the employer, but, more importantly, the loss of valued customers.

The employer, in an effort to stem the losses, installed security cameras and instituted a number of security changes. In addition, it hired a security service to carry out continued mobile surveillance at the workplace. On January 28, 1995, the surveillance team captured Mr. Lucky Gill on video removing computer equipment and caused him to be apprehended by the RCMP. On January 29, 1995, when he reported to work, Gill was called into the office by Mr. M. Saldat, the Manager of the D.H.L. facility in Vancouver, and summarily dismissed. During the course of the

discussion following his dismissal, Gill asked Saldat whether or not the employer might "go easy on him" if he was to provide information to Saldat with respect to who else was responsible for the disappearances of material from the workplace. Saldat responded that he would have to discuss the matter with D.H.L.'s solicitors. Saldat subsequently advised Gill that he could meet with the solicitors at their office the following day. On January 30, 1995, Gill attended at the solicitors' office with a preposterous story regarding his intentions in taking the computers and equipment in question. He intended, he said, to tie a ribbon around the equipment and place it at the employer's front door to show how easy it was to remove goods from the warehouse. With respect to his suggestion that he might provide further information about who was responsible for the thefts, he simply suggested that the employer speak to Mr. George Ball.

Accordingly, Ball was requested to attend at the solicitors' offices on January 31, 1995. While there, Ball told Saldat and the two solicitors who were present that two individuals, Harjit Sandhu and James Ewing, told him that they had "taken" couriered goods from the warehouse. Ewing, according to Ball, removed credit cards that were in courier transit and attempted to obtain cash advances with them. Sandhu, according to Ball, removed computer software from the premises, loaded it into his personal computer at home, and thereafter returned the goods to the warehouse.

In addition to the information he received from Ball, Saldat had been informed by Mr. Jason Wells, the Lead Hand, that on the day that Gill had taken the computers in question, Gill and Sandhu had been in secretive, close conversations all day and, in general, acted in a suspicious manner. The employer, armed with the information received from Ball; its own timing analysis of when the articles went missing; and, the suspicious circumstances reported by Wells, decided to dismiss Sandhu.

On January 31, 1995, Saldat called Sandhu into his office and informed him that he was being dismissed for involvement in theft from D.H.L.. No detailed information

was provided to Sandhu nor was he requested to provide any explanation to the employer.

### III

The union organizing activity at D.H.L. began on December 12, 1994. On December 20, 1994, Sandhu delivered an appropriate number of union membership cards, and the necessary fees, to Mr. Lyle Kent, a union organizer for Local 31. The organizing campaign was done quickly, quietly and efficiently and, according to Sandhu, the employer had absolutely no idea that an organizing campaign was underway at the workplace. Apparently, the first inclination that the employer had of that fact was when the certification application was filed before the B.C. Board. When that application came on for hearing at the end of December 1994, Saldat attended and noticed Sandhu in the vicinity of the B.C. Labour Board's premises. Saldat candidly admitted having seen Sandhu and reporting that fact, in a subsequent conversation, to the President of D.H.L. in Toronto.

The sighting of Sandhu at the B.C. Board is the only suggestion of employer knowledge of Sandhu's participation or involvement in the union organizing activity.

Following his "sighting" at the B.C. Board, Sandhu was provided with a letter of reprimand for leaving work early on January 17, 1995 (Exhibit 5.4). This was the first occasion that Sandhu was reprimanded in writing for his job performance. In his testimony Sandhu admitted both to leaving work without the consent of the employer, as well as to his knowledge that doing so was a serious matter considering the necessity to have couriered goods meet their deadlines for transfer. Although there are occasions where sudden disciplinary attention to a particular employee may signal an anti-union motive, such is not the case here. We find that, in the circumstances, the employer's disciplinary letter was warranted and was without taint of anti-union animus.

#### IV

In his examination-in-chief Sandhu gave an explanation as to his suspicious behaviour on January 28, 1995, the day that Gill was apprehended. He said he was discussing the possible representation of the employees by another trade union with Ball and Gill. And, since Wells had absolutely no idea that he was involved with the union, Wells could not have known what it was they were discussing. However, in cross-examination, he made the statement, completely gratuitously, that Wells had been going around the workplace telling everyone that he, Sandhu, was the union organizer. Another item which showed a dramatic inconsistency was his statement that when he was called into the office on January 30, 1995, he had "no idea whatsoever that he was going to be fired". However, he later admitted that he had prepared for and secretly recorded the discussion with Saldat because of his advance concern that he would be fired (as were Gill and Ewing) and would face the same questions.

#### V

As a legion of cases illustrate, the Board is extremely vigilant to protect the jobs and rights of employees who become involved in the organization of a trade union at the workplace.

At the risk of over-simplification, the Board's purpose, where a complaint pursuant to section 94(3) is filed, is to ensure that anti-union animus was not the reason for, or a consideration in, the employer's dismissal of an employee. The applicable test is described extensively in National Pagette (1991), 85 di 1 (CLRB no. 862), at pages 9-10:

*"When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal,*

*through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus. Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):*

*'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:*

*'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice.'*

*(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)'*

*(pages 34-35; and 14,007; emphasis added)''*

The Board is careful to ensure that the employer does not use outwardly legitimate reasons as a pretext to dismiss an employee for the underlying reasons of trade union activity.

However, the Board's vigilance aside, an employer is not prohibited by the Code from dismissing an employee for legitimate reasons, either before, during, or after, a union organizing campaign. Although on certain occasions the Board will review the reasons given by the employer for the dismissal to ensure that they are genuine and not a pretext for the firing, the Board's function is not to assess whether the reasons given constitute just cause for dismissal but rather to determine whether or not anti-union animus had any role to play in the same. See Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842), where the Board discussed the concept of pretext vs. real cause:

*"When examining the merits of a complaint of unfair labour practice, the Board must be satisfied that the employer has not taken actions to limit or impede the legitimate exercise by employees of the rights conferred by the Code. The employer's actions must not be motivated by anti-union animus, but must be for cause. This does not mean, however, that it is up to the Board to determine whether the reasons given by the employer to justify the action are valid, fair and commensurate with the seriousness of the alleged offence. The Board has no authority to determine whether the penalty imposed is commensurate with the alleged offence (see Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Pierre Fiset (1985), 55 di 233; and 85 CLLC 14,041 (CLRB no. 473)).*

*The Board, however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus. ..."*

(page 190, emphasis added); See also Verreault Navigation Inc. (1978), 24 di 227 (CLRB no. 134)

The Board has consistently taken the approach that anti-union animus need only be a proximate cause for the impugned employer in order for it to be found in violation of section 94(3)(a)(i) of the Code. In order to safeguard the interests of employees in circumstances, such as the present case presents, the Code, in section 98(4), imposes a rebuttable presumption on the employer to show that the action taken by it was not motivated in any manner by anti-union animus.

*"The Board does not act as an adjudicator to decide whether the employer had just cause to dismiss an employee. Foremost, the employer must establish that, whether or not there was just cause, its action was not tainted by anti-union animus. The union must establish that there was anti-union animus, again whether or not there was just cause."*

(Pierre Fiset (1985), 55 di 233 (CLRB no. 473), page 242; and 85 CLLC 16,041))

In the words of the Board in Banque provinciale du Canada (1979), 36 di 58 at pages 61-62, (CLRB no. 216): "... we must ask ourselves whether there is a cause-effect relationship between (Mr. Sandhu's) union activities and (his) dismissal."

In the present case, it has been established to our satisfaction that the employer, in dismissing Sandhu, was not motivated by any anti-union animus considerations. It is clear that as early as 1994, Sandhu was one of the three primary suspects the employer had with respect to the disappearance of goods from its warehouse. Sandhu was aware of the seriousness with which the employer regarded the removal of couriered goods from the warehouse. In his testimony he conceded that shortly after he began working, an employee was dismissed outright for exactly that reason without any disciplinary steps leading up to the dismissal.

The theft problem at D.H.L. was ongoing and serious. The necessity to stem it quickly, especially in the courier industry, is self evident. The employer was

justifiably consumed with resolving the problem right up to the time that Gill was caught red-handed. Immediately after Gill was caught, he was fired. Consequent on Gill's apprehension, the employer became aware of information, through Ball, which led it to conclude that both Sandhu and Ewing were involved in thefts from the warehouse. That information, albeit perhaps insufficient to prove a criminal charge, was nevertheless sufficient, from the employer's perspective, to dismiss Sandhu and Ewing. Once the information it received from Ball became available, the employer immediately dismissed both Ewing and Sandhu in similar fashion.

Although Sandhu was clearly involved in union activity, to the knowledge of the employer, that union activity, in and of itself, does not serve to protect him from dismissal or discipline where such action is proven, by the employer, to have been taken without taint of anti-union animus. Employees cannot use the umbrella of the unfair labour practice provisions of the Code to protect themselves against disciplinary measures which are the result of their own misconduct; see Pierre Fiset, supra, and Richmond Lions Long Term Care Society and Hospital Employees' Union, [1994] BCLRB no. B375/94 at page 9.

Notwithstanding that the employer was aware, when it dismissed him, that Sandhu had been involved in organizing the trade union, it is clear that neither Sandhu's union organizing conduct nor any other anti-union animus had a role to play in the employer's decision. The application is accordingly dismissed.

## VI

During the course of the hearing, counsel for Mr. Sandhu applied to introduce, as evidence, tape recordings made by Sandhu of discussions he had with both Saldat and Ball. The recording with Saldat was made at the time that Sandhu was dismissed.

The recording with Ball was made the night before the hearing, when Sandhu telephoned Ball in order to question him about his (Ball's) role in Sandhu's dismissal. There was no suggestion that either of the conversations were taped with the consent or knowledge of the other parties.

During the course of argument on the motion, the Board indicated that, in the circumstances, it would not be receptive to admitting the tapes in question. At that point, Counsel indicated that he would not press the matter and proceeded. At the conclusion of the hearing, however, both parties requested that the Board, in its reasons, provide them with a ruling on the issue for their future purposes; by these reasons we do so.

## VII

There is no dispute that evidence that is relevant is ordinarily admissible unless excluded for specific reasons. Properly proved tape recordings are admissible as evidence in the Courts. At issue in the present case is not, however, whether or not the tapes in question are legally admissible, but rather whether or not the Board, bearing in mind its labour relations purposes, should permit their introduction, legally admissible or not, in the circumstances of the present case.

By virtue of section 16(c):

*"16. The Board has, in relation to any proceeding before it, power*

*...*

*(c) to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not;"*

The section provides the Board with unfettered discretion to admit evidence that is not otherwise admissible in a court of law and gives life to the fact that the Board, in conducting its processes, must accommodate other demands than those of the strict and formal evidentiary rules required by an otherwise adversarial process. This broad principle is enunciated well in Re Kingsway Transport and Teamsters Union (1983), 10 LAC (3d) 440, where the arbitrator states:

*"... The demand that the process be fair, and that it be perceived as fair, requires that boards take great care to ensure that their decisions are based on reliable evidence, evidence which is given viva voce and exposed to cross-examination. To that extent the process must, of necessity, tolerate some legal formality. The adversary practices developed in the civil and criminal courts are recognized as offering the best method to discover the truth, and their incorporation into the arbitration process is accepted. However, the arbitration process must accommodate other demands as well. To remain credible, it must sacrifice some of the formality necessary in judicial proceedings; it must seek to resolve disputes as expeditiously as possible. To answer to these demands it may be necessary to accept a procedure which abandons some of the rigorous requirements of proof in a court of law. The task of the board is to balance these sometimes conflicting demands in a way which will respect the process."*

(Page 445; emphasis added)

The above perspective applies equally to this Board. We are left with the task of balancing conflicting demands in the context of interpreting the Canada Labour Code where both the process and the substantive legislative focus and purpose differ from that which otherwise exist in the courts.

## VIII

Although the current issue arose in its decisions on three previous occasions, to date the Board has not examined the principles which surround the admissibility of surreptitiously recorded conversations.

The first instance of the Board admitting such taped evidence occurred in CKLW Radio Broadcasting Limited (1977), 23 di 51; and 77 CLLC 16,110 (CLRB no. 101). This was an unfair labour practice complaint alleging that an employer failed to bargain in good faith. The union wished to admit a surreptitiously taped telephone conversation that an employee (Ryan) had with the president (McCord) of the employer. At page 74 the Board discussed the taped evidence and stated:

*"The union says McCord revealed the employer's anti-union position in a telephone conversation with employee Tom Ryan on April 3. This conversation was taped by Ryan without McCord's knowledge. Over the employer's objection the Board allowed the introduction of the tape and ruled that if section 178.1 of the Criminal Code of Canada, R.S.C. 1970, c. C.-34, applied to this Board's proceedings then section 178.16 had been satisfied for the purpose of our proceedings. We allowed the introduction of the tape in the pursuit of the truth, but that is not to be interpreted that we condone Ryan's act. After hearing the tape, McCord testified the tape was accurate and complete. ..."*

In Billington (1981), 45 di 247 (CLRB no. 338) at page 252, the Board referred to the question again, but only in passing. Finally, the issue was addressed in Steve Kasper (1992), 90 di 130 (CLRB no. 979):

*"... During the testimony of Mr. Kasper, his counsel attempted to put before us copies of what were purported to be partial transcripts of taped conversations with both management and union officials. The actual recordings were said to have been done without the knowledge of the other participants during the disciplinary investigations referred to earlier as well as at other times throughout the process. The transcripts were described as being in Mr. Kasper's own handwriting. They were said to be incomplete with many parts of the alleged conversations being 'inaudible'. The existence of the transcripts, the tape recordings or their contents had never been brought to the attention of the parties at any time during the lengthy period of time that this complaint has been before the Board. Nor was the Board's Officer notified of their existence during the investigation stages of the*

*proceedings or, to our knowledge, during the attempts to arrive at a settlement of the matter. Furthermore, during cross-examination of the employer's witnesses, counsel for Mr. Kasper made no reference to the possible existence of these transcripts or tape recordings which may have contained evidence contrary to what had been sworn to.*

*In those circumstances, without dealing with the broader question of admissibility or the other problems surrounding the need for proof of authenticity of such evidence, the Board declined to accept the evidence offered on the grounds of fairness. Clearly, to allow Mr. Kasper to present material of this nature at this late stage in the proceedings would have been totally unfair to the employer, particularly when he knew that he had the tapes in his possession all along."*

(pages 138-139)

It is important to note that the Board raises the fact that Kasper had an obligation, pursuant to the Board's regulations, at the time he filed the complaint to produce all of the facts and circumstances on which he relied. The Board correctly observes that the timely disclosure of evidence, and the aspect of fairness assured thereby, is both important and a determining factor. The notion clearly being that, if everything is produced, settlement is more likely achieved.

Although this Board has not dealt with the issue in detail, it has been addressed by both the British Columbia and Ontario Labour Relations Boards on a number of occasions. As a general policy, the B.C. Industrial Relations Council has adopted the cautious approach taken by the panel of the B.C. Labour Relations Board in Michael Miletich, [1984] BCLRB No. 398/84. There, the majority of the panel found it was inappropriate to admit tapes into evidence for the two following reasons quoted here at length:

*"The Union and the Employer has brought to our attention a concern about the possibility of a rapid increase in applications such as this in the future. For ease and clarity, we have chosen to call this the floodgates argument. In our experience in the labour relations community and at the Labour Relations Board, we have understood that in order to promote effective industrial relations, the Board*

*should not condone any practice which would have no other purpose than to create a climate of distrust and antagonism. It is our opinion that to allow the production of these tapes would be to interfere with, rather than to promote, proper relations between a union and its bargaining unit members. The ramifications are more far reaching than that however, as the Employer has pointed out. It is our opinion that there is a large possibility that if tapes are entered into evidence in the future, that, at any time parties are in dispute there is a possibility that conversations would be taped only to be brought up later in sensitive moments, effectively destroying any opportunity for settlement. The majority of this Panel is concerned that to allow the tapes into evidence would be to encourage parties in every dispute, to distrust each other, to disrupt their desire for resolution and to prolong proceedings at the Labour Relations Board by interminable delays due to the necessity to adjudicate each and every application for admission of taped conversations into evidence.*

*The second concern of the majority of the Panel is that the tapes may be unreliable. It will not be too long before parties will learn of methods to alter the tapes taken of conversations, to omit to delete certain portions of the tape or to garble some of the conversation in order to produce a different effect; these are all possibilities that the Board does not have the expertise to protect against. There is too much opportunity for misuse of electronic taping operations. As technology becomes more advanced there is going to be no possible method for the Board to determine the reliability of such tapes."*

(page 10; emphasis added)

In Focus Building Services Ltd., [1986] BCLRB no. 331/86, the original panel while endorsing the policy considerations against the admission of such evidence, also considered the fact that the parties were able to adduce viva voce evidence on the conversations recorded and to cross examine on that evidence.

In reconsideration of that decision, [1987] BCLRB no. C31/87, the Council added that the impossibility of settlement or the poor quality of the relationship between the parties were irrelevant factors. The panel was concerned with the floodgate effect that the admittance of such evidence could create in the collective bargaining process.

*"... I am satisfied that the admittance of such evidence would encourage a climate inconsistent with the Council's mandate under section 27(a); '...securing and maintaining industrial peace...'; Section 27(b); '...improving the practices and procedures of collective bargaining ...' and Section 27(c); '...promoting conditions favourable to the orderly and constructive settlement of disputes. ...'."*

(page 6)

The Council made it clear, however, that its decision must not stand as an absolute prohibition of tape recorded evidence which could be of some assistance in exceptional circumstances where, for example, the evidence could not be attained in another manner.

*"... Where the evidence can be attained in another fashion, albeit even where it is not 'best evidence', the parties can expect the panels of the Council to refuse to admit tape recorded evidence. ..."*

(pages 6-7)

A different approach has been adopted by the Ontario Labour Relations Board which, in general, admits tape recorded evidence and focuses on a different approach than that adopted in British Columbia. Its position is articulated in the decision of J. Sousa Contractor Limited, [1988] OLRB Oct. Rep. 1027, where it states:

*"23. In that regard [the Board's dismissal of the employer's objection to the admission into evidence of the tape-recording], the Board considered that, except in limited circumstances which were not applicable, the Board does not have a discovery process in its proceedings. In the circumstances of this case, there was no obligation on the applicant to disclose any evidence, including the tape-recording, relevant to the proceedings, whether or not it intended to rely on it, prior to the hearing as the respondent complained it should have. In addition, applicant's counsel had put the statements he asserted were contained on the tape-recording to Maria Silva in an express and particularized way, although he did not first advise her of the existence of the tape-recording. In our view, the rule of fairness articulated in Brown v. Dunn (1893) 6 R. 67 (H of L) (adopted in Peters v. Perras (1909) 42 S.C.R. 244 (S.C.C.) and United Cigars*

Stores Ltd. v. Buller (1931) 66 O.L.R. 593 (Ont. C.A.) had been substantially complied with. ...

24. In this case, the rule in Brown v. Dunn had been substantially adhered to, the facts in issue to which the tape-recording relates are central and not merely collateral, the respondent had, pursuant to section 89(5) of the Act, the burden of proof with respect to those facts, and, though it was no doubt intentional, the non-disclosure by the applicant was not inconsistent with current practice before the Board. **Further, no other rule of fairness, natural justice, or evidence made this tape-recording inadmissible. A tape-recording, if proved, can be evidence (probably the best evidence) like any photograph, video tape, or other 'document' within the meaning of the word in law (see for example Rule 30 of the Ontario Rules of Procedure). The Board also has the discretion, under section 103 of the Act, to determine its own procedure and to accept such evidence as it considers proper. Further, the respondent had the right to re-examine Maria Silva or to call evidence to explain the contents of the tape-recording, and the respondent's counsel could (and did) make adverse comment on the failure of the applicant to disclose the existence of the tape-recording earlier.**

25. Mrs. Silva unequivocally denied making most of the statements attributed to her when they were put to her by the applicant's counsel. However, she identified the tape-recording and agreed that it was an accurate representation of the conversation she had with George Oliveira [the employee]... There is no evidence to suggest that the tape-recording is anything less than accurate. ..."

(Page 1034; emphasis added)

In the matter of Royce Dupont Poultry Packers, [1989] OLRB May Rep. 492, the OLRB looked at the issue again in the context of a taped recording of the employer's comments made at a "captive audience" meeting with its employees. In its decision, the Board, referring to J. Sousa Contractor Ltd., *supra*, said the following:

"20. ... The statements alleged to have been made by [the employer] at the [captive] meeting are themselves alleged to have constituted unfair labour practices. The tape-recording is simply one type and form of evidence of what is alleged to have occurred at that meeting. When the employer was being cross-examined, he was first given the

*opportunity to admit or deny that he made the alleged statements. Only then did Counsel disclose the existence of the tape... Just as in appropriate circumstances a witness can place in evidence notes made contemporaneously with the relevant events, similarly a tape-recording made by a witness is in these circumstances admissible. There was no legal impediment to admitting the tape nor any labour relations purposes that ought to lead us to hold inadmissible such a tape-recording. The tape-recording simply enabled the Board to have the best evidence of what occurred at that meeting. ..."*

(pages 496-497)

## IX

It must be remembered that parties who appear before the Board typically continue in an ongoing labour relations relationship with one another. The successful functioning of that relationship is dependent, as far as possible, on mutual trust and respect. It is difficult to imagine how open and frank discussions, in an atmosphere of mutual trust and respect, could be carried on if either party was concerned that the other might be recording the conversation to be played back to the Board or in another forum at some subsequent period of time.

Were the Board to adopt a broadly permissive policy with respect to the admission of surreptitiously recorded evidence, it is not difficult to envisage how proceedings before it could become inexorably protracted by applications to have the recordings in question properly proved in an evidentiary fashion similar to that in the courts. Nor is it difficult to anticipate adjournments requested in order to permit the tapes to be analyzed by experts, not to mention the introduction of expert testimony relating to the recordings in question. Without attempting to overstate the case, to allow this type of evidence without restriction, would open an evidentiary Pandora's box from a labour relations perspective. This is particularly so when one keeps in mind the objects and purpose of the Code and the Board's role in the implementation of the same.

As part of its mandate, as set forth in the preamble of the Code, it is incumbent on the Board, in circumstances such as the present, to intervene and assist the parties in an attempt to resolve their differences. Section 98(1) of the Code provides, in unfair labour practice complaints, that the Board may intervene to assist the parties in settling their dispute. Such is the purpose, inter alia, of section 32(1)(e) of the Board's Regulations, which requires the parties to provide: "full particulars of the facts and grounds supporting the complaint". However, if evidence that could be vital to the resolution of a case is not disclosed, efforts to settle the dispute amicably would be jeopardized and the fulfilment of one of the objectives of the Code compromised. In keeping with the objectives of the Code, a party that attempts to use tapes must divulge the existence and contents of the same to the other party as soon as possible. This is a necessary requirement if an early and fair resolution of matters brought before the Board is to be achieved.

In CPET (1995), CLRB letter decision #1479 (Board file 745-4733), the Board recently stated (page 4; translation):

*"The Preamble of the Code states that the Board has the mandate to encourage 'free collective bargaining and the constructive settlement of disputes' and to promote 'the determination of good working conditions and sound labour-management relations.' It is in light of such considerations that the Board must exercise the discretion conferred by section 16(c) of the Code to accept or refuse evidence that would otherwise be admissible before another forum. ...*

*The Board finds that the surreptitious taping of conversations between representatives of the employer or of the union or employees is not desirable in labour relations. Using this practice to produce evidence must as a rule be excluded from the practices accepted and sanctioned by the Board. This type of practice does not promote open labour relations that are conducive to discussions and an expeditious settlement of disputes. Rather, it would negatively affect the quality of labour-management relations and discourage genuine attempts at establishing labour relations that are based on a minimum of mutual trust. There is, in a way, a presumption that surreptitious taping entails negative repercussions with respect to labour relations. ..."*

The competing interests which the Board must address when applying its discretion pursuant to section 16(c) of the Code to "receive and accept" taped evidence, are multifaceted; they include: the burden of proof that must be met in the case; the destructive impact on the climate of industrial relations between the parties; the unreliability of such evidence; the ability of the parties to adduce viva voce evidence and be subjected to cross examination thereon; the demand that the process be fair and be perceived as fair; the necessity to ensure full disclosure which will in turn facilitate advance settlement of the case. To remain credible, the Board must sacrifice some of the formality demanded of judicial proceedings in order to ensure that the broader labour relations interests are served and that the dispute is resolved as expeditiously as possible.

In all, the Board must be carefully circumspect in allowing the introduction of tape recorded evidence in matters before it. Even courts may, and often do, exercise their discretion to exclude technically admissible evidence if the prejudicial effect of the same outweighs its probative value.

Without attempting to comprehensively cover the subject, or otherwise restrict it, it is our view that the principles which the Board should consider - keeping in mind the competing interests referred to above - in determining whether surreptitiously taped evidence can be admitted, should include the following: the party seeking to have the evidence admitted must have disclosed to the other party (and the Board) as soon as practicably possible, the existence of the tape, the identities of the persons taped and the issue in the application that the taped evidence relates to; the party seeking to have the evidence admitted must demonstrate to the Board's satisfaction that the same evidence cannot be obtained through other means; and finally, and most importantly, even if the above criteria are otherwise satisfied, the party proposing to have the evidence admitted, must as an overriding consideration, satisfy the Board that the probative value of the taped evidence outweighs any negative consequences or

prejudicial effect it will have on the hearing of the issue, on collective bargaining, or on the labour relations relationship between the parties.

It is clear that when viewed through the prism of the above principles, the tape recording which Mr. Sandhu attempted to introduce did not meet the above criteria.

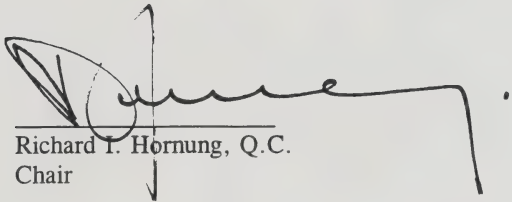
There was no prior disclosure.

The recording with George Ball was apparently designed to show that Ball had denied, to Sandhu, that he, Ball, had told D.H.L. and its two solicitors that Sandhu was involved in theft. Ball himself was not called to testify. The probative value of the taped evidence, therefore, would have been limited and would certainly not have had the effect, even if introduced for that purpose, of calling into question the evidence of Mr. Ritchie Clark, the Solicitor for D.H.L. who testified and was cross-examined in person as to Ball's statements.

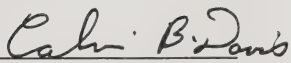
Both Saldat and Sandhu testified personally at the hearing. Mr. Sandhu repeated what appeared to be the relevant portions of the conversation and, when analyzed, the differences between the testimonies of Sandhu and Saldat in that regard were negligible.

The evidence with respect to the tape-recorded conversation with Saldat was therefore unnecessary and would not have assisted the Board in determining the issue of credibility. Finally, the probative value of the tape-recorded evidence, in the circumstances, was far outweighed by the prejudicial labour relations effect that admitting the same might bring.

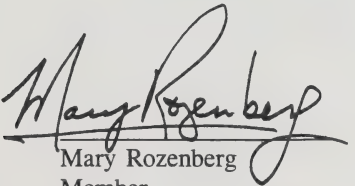
For the reasons above the tape recorded evidence proffered was not admissible.



Richard I. Hornung, Q.C.  
Chair



Calvin B. Davis  
Member



Mary Rozenberg  
Member



# Information

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## Summary

Télébec Ltée, employer, and Canadian Telephone Employees' Association, Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999, International Brotherhood of Electrical Workers, Local 2365, Communications, Energy and Paperworkers Union of Canada, Local 81, and Syndicat des travailleurs et travailleuses de Télébec-CNTU, *applicant unions and mis-en-cause.*

Board Files: 555-3752  
555-3754  
555-3773  
555-3880  
555-3901  
555-3902

CCRT/CLRB Decision no. 1148  
November 17, 1995

On May 15, 1995, the Syndicat des travailleurs et travailleuses de Télébec (CNTU) filed an application for reconsideration of part of a decision issued by the Board on August 1, 1995 (Télébec Ltée (1995), as yet unreported CLRB decision no. 1133). Since this application is aimed at an interim decision within the meaning of section 20(1) of the Code, it was assigned to the original panel for consideration and determination.

The Board was asked to review its decision not to allow the union to take part in the representation votes ordered with respect to the new bargaining units comprised respectively of office employees and of technicians determined by the Board.

## Résumé

Télébec Ltée, employeur, et Association canadienne des employés de téléphone, Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, section locale 1999, Fraternité internationale des ouvriers en électricité, section locale 2365, Syndicat canadien des communications, de l'énergie et du papier, section locale 81, et Syndicat des travailleurs et travailleuses de Télébec-CSN, *syndicats requérants et mis en cause.*

Dossiers du Conseil: 555-3752  
555-3754  
555-3773  
555-3880  
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555-3902

CCRT/CLRB Décision n° 1148  
le 17 novembre 1995

Le 15 mai 1995, le Syndicat des travailleurs et travailleuses de Télébec (CSN) a présenté une demande de réexamen d'une partie d'une décision rendue par le Conseil le 1<sup>er</sup> août 1995 (Télébec Ltée (1995), décision du CCRT n° 1133, non encore rapportée). Comme cette demande vise une décision partielle au sens du paragraphe 20(1) du Code, elle a été assignée au banc initial pour examen et décision.

Le syndicat demande au Conseil de revoir sa décision de ne pas lui permettre de participer aux scrutins de représentation ordonnés à l'égard des nouvelles unités de négociation regroupant respectivement les employés de bureau et les techniciens définies par le Conseil.



According to the CNTU, the Board had not properly exercised its discretion under section 29(1) of the Code by excluding the union from the votes on the grounds that it did not hold representation rights for any of the employees affected. The CNTU alleged furthermore that, pursuant to section 29(2), the Board had to order a vote with respect to the bargaining unit comprised of office employees, because the union had the support of 35 to 50% of members of this unit which is not represented by any union.

The Board dismissed the CNTU's application for reconsideration. Regarding the first argument, the CNTU did not establish any new fact, error in law or misinterpretation that would prompt the Board to review the manner in which it exercised its discretion under section 29(1) of the Code. Regarding the second argument, the Board found that since the application for certification is of the nature of a raid application which seeks first and foremost to allow the employees to change bargaining agent, section 29(2) is not applicable. That provision only applies when there is no union in place which is not the case here. In dealing with raids, the Board requires that the union seeking to displace another union establish that it has the support of a majority of members of the existing unit or of the unit it proposes for the Board to consider the application for certification and the support of the majority of members of the appropriate unit, if applicable, for the Board to certify the union. Therefore, a union seeking to displace another union, with respect to a different unit, could see its application rejected, once the process is completed, if it does not have the support of the required majority, on the date it filed its application for certification.

In the instant case, the Board does not see why it should depart from the rule of representative character required of the raiding union as that

Selon la CSN, le Conseil a mal exercé sa discrétion prévue au paragraphe 29(1) du Code en l'excluant de ces scrutins au motif qu'elle ne détenait de droit de représentation à l'égard d'aucun des employés visés. La CSN allègue en outre que le Conseil doit ordonner un scrutin en vertu du paragraphe 29(2) du Code à l'égard de l'unité des employés de bureau, puisqu'elle détient entre 35 et 50 % d'adhésions dans cette unité qui «n'est représentée par aucun syndicat».

Le Conseil a rejeté la demande de réexamen de la CSN. Quant au premier motif, la CSN n'a démontré ni fait nouveau ni erreur de droit ou d'interprétation qui amènerait le Conseil à revoir la façon dont il a exercé sa discrétion aux termes du paragraphe 29(1) du Code. Quant au deuxième motif, le Conseil a déterminé qu'étant donné que la demande d'accréditation de la CSN est de la nature d'une demande de maraudage visant d'abord et avant tout à permettre aux employés de changer d'agent négociateur, le paragraphe 29(2) ne s'applique pas. Cette disposition ne s'applique que dans des situations dites de «champ libre», ce qui n'est pas le cas en l'instance. Dans les cas de maraudage, le Conseil exige que le syndicat qui cherche à en déplacer un autre démontre qu'il détient une majorité d'adhésions dans l'unité existante ou dans celle qu'il propose pour que le Conseil accepte d'étudier sa demande d'accréditation, et dans l'unité jugée habile à négocier, le cas échéant, pour que le Conseil l'accrédite. C'est donc dire qu'un syndicat qui veut en déplacer un autre, à l'égard d'une unité différente de l'unité existante, risque de voir sa demande rejetée, une fois l'exercice complété, s'il ne détient pas la majorité requise à la date où il a présenté sa demande d'accréditation.

Dans le cas présent, le Conseil ne voit aucune raison de s'écarter de la règle de représentativité exigée d'un syndicat maraudeur telle qu'elle a

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rule has been applied by the Board, including when the description of the bargaining units is amended at that time.

The Board did not accept the CNTU's literal interpretation of section 29(2). That interpretation does not take into account all the provisions of the Code dealing with representative character or their finality. Furthermore, to accept that interpretation would jeopardize the industrial peace contemplated by the rule of representative character established with respect to raids.

toujours été appliquée par le Conseil, y compris lorsque la description des unités de négociation est modifiée à cette occasion.

Le Conseil n'a pas retenu l'interprétation littérale que fait la CSN du paragraphe 29(2). Cette interprétation ne tient compte ni de l'ensemble des dispositions du Code sur la représentativité ni de leur finalité. Au surplus, accepter cette interprétation risquerait de mettre en péril l'objectif de paix industrielle visé par la règle de représentativité établie en cas de maraudage.



## Reasons for decision

Télébec Ltée,

*employer,*

*and*

Canadian Telephone Employees' Association;  
Teamsters, Brewery, Soft Drink and  
Miscellaneous Workers' Union, Local 1999;  
International Brotherhood of Electrical  
Workers, Local 2365; Communications, Energy  
and Paperworkers Union of Canada, Local 81;  
and Syndicat des travailleurs et travailleuses de  
Télébec-CNTU,

*applicant and mis-en-cause unions.*

Board Files:	555-3752
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CCRT/CLRB Decision no. 1148  
November 17, 1995

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The Board was composed of Ms. Louise Doyon and Ms. Suzanne Handman, Vice-Chairs, and Mr. François Bastien, Member.

### Appearances

Mr. Marc Lapointe, assisted by Messrs. François Pinsonnault and Raynald Wilson, for Télébec Ltée;

Mr. Paul Tremblay, assisted by Mr. Jean Lord, president, and Ms. Carmel Brunelle, vice-president, for the International Brotherhood of Electrical Workers, Local 2365;  
Mr. Guy Martin, assisted by Mr. Jacques Morand, union advisor, and Mr. Guy Perreault, for the Syndicat des travailleurs et travailleuses de Télébec-CNTU;

Mr. Claude Melançon, assisted by Mr. Robert Pelletier, for the Communications, Energy and Paperworkers Union of Canada, Local 81;

Mr. Luc Martineau, assisted by Ms. Louise Cadieux, Ms. Grenier and Ms. Brisson (vice-presidents), for the Canadian Telephone Employees' Association; and Mr. Gino Castiglio, assisted by Mr. Robert Bouvier, for the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

## I

On August 15, 1995, the Board received from the Syndicat des travailleurs et travailleuses de Télébec-CNTU (CNTU), pursuant to section 18 of the Code, an application for reconsideration of part of its decision issued on August 1, 1995 in Télébec Ltée (1995), as yet unreported CLRB decision no. 1133. Since this application deals with an interim decision within the meaning of section 20(1) of the Code, it was assigned to the original panel for consideration and determination.

## II

In that decision, the Board determined that there were two appropriate bargaining units at Télébec Ltée (the employer): a unit consisting of office employees, and a unit comprised of technicians. The Board also decided, pursuant to section 29(1) of the Code, to order a representation vote in each of the bargaining units. The Board made the following determination on the question of which unions could participate:

*"This is the reason why the Board decided that all bargaining agents that now represent employees in one of the units deemed appropriate and that filed a certification application may participate in the representation vote for one of the units or both units. Although the present situation is not identical to that in Canadian Broadcasting Corporation (1978), 27 di 765; and [1979] 2 Can LRBR 41 (CLRB no. 138), insofar as the recognized bargaining agents are also applicants for certification, the Board feels that the rule which states*

*that 'if the employees are already represented, they must be able to consider the incumbent union when making their choice' (pages 782; and 55) applies here. Unlike the situation in the above-mentioned case, the results of the representation votes will enable the Board in the present case to certify the recognized bargaining agent that attains the representative character required for a given unit, since each bargaining agent filed a certification application. With regard to the CNTU, which presently has no representation rights and does not meet the Code's minimum requirements with respect to the representative character for any of the bargaining units, the Board finds that it cannot be included on the ballot."*

(page 29; emphasis added)

After the parties were notified of that decision, the CNTU asked that the Board's labour relations officer review the information concerning its representative character. As a result, the information before the Board at the time it rendered its decision was rectified in that the CNTU had the support of more than 35% but less than 50% of the employees in the office employee unit. Moreover, CNTU's support within the technician unit stood at less than 35%.

The CNTU submitted that the Board should reconsider its decision for the following reasons:

(1) The Board had improperly exercised its discretion under section 29(1) of the Code by excluding the CNTU from the representation vote on the ground that it had no representation rights in respect of these units. Therefore, the Board's decision was unfair to, and discriminated against the CNTU.

(2) The fact that the CNTU had the support of between 35% and 50% of the employees in the office employee unit is a new one. Had the Board been aware of this fact when it rendered its decision, it would have ordered a representation vote in respect of this new unit which was not represented by any other union within the

meaning of section 29(2) of the Code. As a consequence, the CNTU would have been entitled to participate in the vote.

In support of the second argument, the CNTU cited inter alia the interpretation previously given by the Board to the expression "where no collective agreement applicable to the unit is in force and no trade union has been certified," contained in section 24(2)(a) of the Code (see in particular Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRB no. 383); and Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRB no. 642)). The CNTU also alleged that the Board must uphold the interpretation it had given to that provision when it ruled the certification applications filed by the CNTU and the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999 (the Teamsters) were timely. These applications covered bargaining units that are larger than the recognized units; consequently, "no collective agreement applicable to [the units was] in force and no trade union [had] been certified [in respect of them]" (Télébec Ltée, October 14, 1995 (LD 1362)).

The other unions challenged CNTU's reconsideration application. They argued that the decision cannot be reconsidered on the basis of established principles (see Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41); CanWest Pacific Television Inc. (CKVU) (1991), 84 di 19 (CLRB no. 847); and Canadian Broadcasting Corporation (1991), 86 di 92; and 92 CLLC 16,006 (CLRB no. 897)). As to the merit of the application, they claimed that the Board had properly exercised its discretion under section 29(1). They also alleged that section 29(2) does not apply in a raid situation such as the one that exists here. In fact, affected employees have long been represented by bargaining agents; the Board should therefore apply the principles it has developed, and has applied until now, with respect to membership support.

In reply to CNTU's application, the Teamsters subsidiarily requested that the Board review its decision to order a vote under section 29(1) of the Code in respect of the technician unit since they had the support of more than 50% of the employees in this unit when they filed their certification application.

The employer did not file any submissions on the reconsideration application.

### III

After having reviewed the file and examined the parties' submissions, the Board decided to dismiss CNTU's reconsideration application for the reasons given below.

#### 1. The Representation Votes Ordered under Section 29(1) of the Code

The Board decided that CNTU's first argument does not meet the conditions pertaining to the admissibility of a reconsideration application. The CNTU did not allege any new fact or establish any error of law or interpretation indicating that the Board had improperly exercised its jurisdiction, or had exercised it in an unfair or discriminatory manner. In its decision, the Board explained why it had ordered representation votes under section 29(1) and had allowed only the incumbent bargaining agents to participate. The CNTU did not convince the Board it should reconsider that part of its decision.

For the same reasons, the Board also dismissed the Teamsters' subsidiary request to set aside the order to hold a representation vote and to certify them as bargaining agent for the technician unit.

2. The Application for a Representation Vote under Section 29(2) of the Code

The fact that the Board found out after its August 1, 1995 decision that the CNTU had the support of between 35% and 50% of the employees in the office employee unit could warrant the reconsideration of the initial decision. However, even if this fact had been known prior to its August 1 decision, the Board would not have ordered a representation vote under section 29(2) of the Code in respect of the office employee unit, as the CNTU is requesting. The office employee unit that the Board deemed appropriate is different from the unit sought by the CNTU and from the existing units for this employee category; moreover, it is not a unit in respect of which the Board must order a representation vote under section 29(2). The present situation is not covered by this provision which reads as follows:

*"29.(2) Where a trade union applies for certification as the bargaining agent for a unit in respect of which no other trade union is the bargaining agent, and the Board is satisfied that not less than thirty-five per cent and not more than fifty per cent of the employees in the unit are members of the trade union, the Board shall order that a representation vote be taken among the employees in the unit."*

In its August 1, 1995 decision, the Board characterized CNTU's application as follows:

*"In their applications, the Teamsters and the CNTU are both seeking to represent bargaining units that are different from the existing units. At first glance, these applications, in a number of respects, resemble review applications, or more precisely, combined raiding and review applications. However, these applications cannot be characterized outright as such because the Board, never having certified a union to represent Télébec employees, has no past decision that it can review or amend pursuant to section 18 of the Code (see Canadian National Railway Company (1992), 88 di 139 (CLRB no. 945); Canadian Pacific Limited (1992), 88 di 126 (CLRB no. 944); Canada Post Corporation, *supra*; Canadian Broadcasting*

Corporation, supra; and Purolator Courier Ltd. (1993), 91 di 149 (CLRB no. 1003))."

(page 25; emphasis added)

This characterization stemmed from the fact that the CNTU was seeking to represent, in a single bargaining unit, office employees from a number of bargaining units who were represented for years by various bargaining agents. Although the certification application sought to redefine the bargaining structure for the office employees, it was not a first attempt at unionizing these employees, or at acquiring for them the right to bargain collectively. Its main purpose was to oust the incumbent bargaining agents. In this sense, CNTU's application corresponds to the notion of raiding which the Board has adopted and has applied until now.

Over the years, the Board has developed principles governing membership support in the case of raid situations. The first decisions dealing with this question held that the unit sought must be identical to the existing unit and that the union seeking to oust another union must have the support of more than 50% of the employees in the unit when it files its certification application. If the incumbent bargaining agent still represents a majority of employees, the Board orders a representation vote under section 29(1) to satisfy itself, in accordance with section 28(c), that a majority of employees wants to be represented by one of the unions. However, if the Board is satisfied that the raiding union has the required majority, it can certify it without a representation vote.

When it developed this policy, the Board considered the meaning and scope of sections 28 and 29 (section 29(2) in particular) which were added to the Code in 1972. The Board first examined the meaning of these new certification provisions in Swan River - The Pas Transfer Ltd. (1974), 4 di 10; [1974] 1 Can LRBR 254; and 74 CLLC 16,015 (CLRB no. 8), where it stated:

*"The amended Part V of the Code contains the new sections 126 and 127 replacing section 115 subparagraph (2) of the former Part V. The Board points to the following apparent changes in the two sets of texts. Section 15(2) did not contain the mandatory verb 'shall' at the end, which is now found in section 126 and in section 127(2).*

*Further, whereas there was no possibility under section 115(2) for a union to obtain consideration of an application for certification unless it had a majority of the employees in a bargaining unit as members in good standing as at the date of the application or unless it did obtain a majority of votes of the employees in the unit, the new Sections 126 and 127 establish three different sets of circumstances:*

- 1. Where a majority exists, the Board shall certify (section 126);*
- 2. If there is doubt in the mind of the Board as to the wish of the employees, it **may** order a vote (section 127 (1));and*
- 3. in certain circumstances (viz., **when there is no other trade union in the picture**) where a union files an application and is found out not to have less than 35% but not more than 50% of the employees in the unit as members, then the Board shall order a vote (section 127(2)). ... "*

(pages 17; 263; and 884-885; emphasis added)

According to this interpretation, section 127(2) (now section 29(2)) applies only in an open field situation, that is, where there is no union.

In CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151), the Board outlined the conditions governing the application of section 127(2), and particularly the fact that this provision does not apply where a union wants to be certified with respect to a unit that is already represented by another union. At the time, however, no one anticipated the possibility of a unit being redefined by the Board in a raid situation, as is the case here. The Board stated:

*"... Section 127(2) stipulates that where a trade union applies for certification to represent a unit which no other union is representing and the Board is satisfied that between thirty-five and fifty per cent of the employees are members of the applicant union, the Board shall order that a vote be taken.*

*It follows that if the applicant union does not have a minimum of thirty-five per cent of the employees as members, the Board does not even accept its application and does not open a file. Such an application is inadmissible ab initio.*

*Where a trade union applies for certification as the bargaining agent for a unit that is represented by another trade union, section 127(2) does not apply. The reason for this difference is that, in the first case, there is no incumbent union, and the legislator, who was anxious to promote collective bargaining in accordance with the preamble to the Act while realizing that it was more difficult to recruit members from a milieu that was unacquainted with collective representation, obliged the Board to take a vote. This procedure enables a trade union to continue its organizational campaign and to try to obtain the required majority by means of a vote. In the second case, the situation is clearly different. There is an incumbent trade union and the employees concerned are already familiar with the system of collective representation. The main effect of such an application would be to change the bargaining agent. It follows that in such a case, according to section 126(c), the applicant union must, at the time it files its application, have more than fifty per cent of the employees as members in order for its application to be accepted and a file opened. Otherwise, it is inadmissible ab initio."*

(pages 411-412; and 285; emphasis added)

In Bell Canada, (1979), 30 di 112; and [1979] 2 Can LRBR 435 (CLRB no. 192), scarcely eight months later, the Board reiterated its reasons and discussed in greater detail the rationale for the rule requiring the support of more than 50% of employees as of the date the "raiding" application was filed:

*"As opposed to a union which seeks to represent a group which is not otherwise represented by a bargaining agent, a union which seeks to oust another is not automatically entitled to have a*

*representation vote taken. Only a union which seeks to represent a group which is not already represented by a union is automatically entitled to have a vote taken. The Board stated the reasoning behind this rule in its decision No. 151 in CJMS:*

*'The reason for this difference is that in the first case, there is no incumbent union, and the legislator, who was anxious to promote collective bargaining in accordance with the preamble to the Act while realizing that it was more difficult to recruit members from a milieu that was unacquainted with collective representation, obliged the Board to take a vote. This procedure enables a trade union to continue its organizational campaign and to try to obtain the required majority by means of a vote. In the second case, the situation is clearly different. There is an incumbent trade union and the employees concerned are already familiar with the system of collective representation. The main effect of such an application would be to change the bargaining agent.'*

*The purpose of a vote which is ordered automatically under section 127(2) is to promote the establishment of the collective bargaining system. It enables the union to continue its membership campaign after the date on which it files its application for certification, so that it may ultimately obtain the majority status it requires in order to be certified under section 126. In the case of a union which seeks to oust another, the legislator left it to the Board's discretion to order a vote. As we stated in CJMS, and as has been reiterated by the majority of the labour relations boards in the country, at the time when it files its application for certification, the union which is seeking to oust another must be capable of proving that it has in its ranks a majority of the employees in the certification unit. There are two basic reasons for this rule: first, the Board should not favour one union over another, and if it were to adopt the general policy of ordering votes in every case where a union seeking to replace another represented between thirty-five and fifty percent of the employees, as is the case under section 127(2), this would place the emphasis on the formation of a union - i.e., it would give the union more time in which to get organized - rather than on the wishes of the employees as is required by sections 126 and 127. Such a procedure would clearly prejudice the incumbent union which, until the contrary is proved, represents the majority of the employees for whom it has, in the normal course of events, negotiated a collective agreement. Second, if the Board were to order a representation vote each time that a union seeking to replace another was able to demonstrate that it represented between*

*thirty-five and fifty percent of the employees, we would find ourselves overwhelmed by union raids, which would not help to promote industrial peace. In summary, we are of the opinion that the purpose of the Code is to promote the establishment of the collective bargaining system, and not to promote a raiding campaign by a union. If employees wish to change their union membership, they must indicate at the time when the new application for certification is filed that a majority are in favour of such a change. ..."*

(pages 115-116; and 438-439; emphasis added)

So far, the Board has followed this approach in all raid situations, including Télé-Métropole Inc. (1992), 88 di 205 (CLRB no. 951); and VIA Rail Canada Inc. (1993), 92 di 90 (CLRB no. 1022). In both cases, the Board reaffirmed that a union seeking to oust one or more other unions must have the support of more than 50% of the employees in the unit sought.

In Télé-Métropole Inc., *supra*, the Board considered that the Code authorizes the filing of a certification application seeking to merge two existing units into a single bargaining unit. The Board said the following concerning the admissibility of a "raiding" application:

*"A union is perfectly free to file such an application, just as an employer is free to challenge the scope of an existing unit during raiding. A more compelling reason for allowing a union to make such an application is that, ultimately, it is the Board that defines the appropriate bargaining unit, and the Board is not bound by such an application. ..."*

(page 206)

The Board described as follows the conditions governing the representative character of a union that tries to oust one or more bargaining agents for one or more new units:

*"... If the evidence shows that an expanded unit would be appropriate and particularly where the proposed changes are not intended, as is often the case, to indirectly circumvent the representative character provisions of the Code, then the Board can enlarge the bargaining unit."*

(page 207; emphasis added)

In VIA Rail Canada Inc., *supra*, a council of trade unions filed a certification application to represent a new bargaining unit that the Board had determined during a review of the bargaining units. No bargaining agent had been certified to represent this unit comprised of employees who had, until then, been represented by various unions. After concluding that the certification application was a "raiding" application, the Board applied the membership support rule in raid situations:

*"The present application may be considered as being in the nature of a raid. Certainly there are existing bargaining agents, which the applicant seeks to displace, although those bargaining agents of course represent employees in the existing craft bargaining units, whereas it is the right to represent the employees in the new unified unit that, given our determination as to the appropriate unit in this case, is in issue here. The effect of section 29 of the Code is that a raiding trade union is not entitled to be placed on a representation ballot unless it can establish that a majority of the employees in the bargaining unit are among its members. The evidence of membership on which the applicant council relies in this case does not establish that the applicant represents a majority of the employees in the bargaining unit."*

(pages 92-93; emphasis added)

It is clear that, whenever the Board receives a "raiding" application filed within the time limits provided for in the Code, it will examine the application on its merits when the union seeking to oust another union demonstrates that it has majority support, either in the existing unit or in the proposed unit. Moreover, the raiding union must demonstrate that it has majority support in the unit deemed appropriate in

order to be able to participate in a representation vote, or to be certified without a vote, as the case may be. Thus, a certification application may be timely with respect to the requirements of section 24 of the Code, as does CNTU's application in the present case, but still be dismissed upon being redefined by the Board when the application does not comply with the membership support rule pertaining to raid situations, at the date it is filed.

In support of its reconsideration application, the CNTU proposed a literal interpretation of section 29(2). It argued that a vote is mandatory in the case of the office employee unit in respect of which, it claims, "no other trade union is the bargaining agent." In our opinion and given the Board's recent definition of this unit, this argument does not take into account past Board decisions which have established that section 29(2) of the Code does not apply to a "raiding" application. The main purpose of such an application is to enable employees to change bargaining agents. This provision applies only where there genuinely is a so-called "open field," that is, where there is no union. CNTU's interpretation apparently does not take into account the overall provisions of the Code concerning the representative character or their purpose, including the objective of the mandatory vote under section 29(2) which, in the final analysis, must allow non-unionized employees to decide whether they really want to be represented by a union. In the Board's opinion, this interpretation is confirmed by section 30(2) which gives employees the opportunity of choosing not to be represented by one of the trade unions named on a ballot, where the field is open.

In Canadian Broadcasting Corporation (1995), 97 di 129 (CLRB no. 1118), the Board drew a parallel between sections 29(2) and 30(2) of the Code: the former is intended to facilitate access to certification; the latter offers employees the option of not being represented where there is no existing bargaining agent. The Board had the following to say in this regard:

*"First, section 29(2) is specifically intended to support certification. This provision automatically entitles a union that files a certification application with minority support to a representation vote that may or may not be so its way [sic]. In other words, Parliament decided that, as soon as a trade union obtains the support of 35% of the members in a unit, the Board no longer has the power to dismiss a minority application. However, the union also takes upon itself a certain risk in filing such an application. If the application is dismissed, the union is subject to the sanction imposed by section 31 of the Regulations, and must wait six months before filing another application. Furthermore, the Board can only order a representation vote if the unit is not represented by a trade union. Section 30(2) is the only provision in the Code that allows the employees to decide whether or not they wish to be represented by a union. In fact, this is the only case in certification proceedings where the ballot does not offer a choice between unions, but rather that of being represented or not by a union. It is clear then that the purpose of section 29(2) is different from that of section 29(1). Section 29(2) gives a chance, as it were, to an inspiring bargaining agent by allowing it to end its organization campaign as soon as it has the support of 35% of the employees in a unit."*

(page 133; emphasis added)

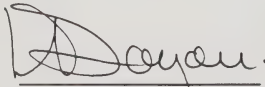
The purpose of section 29(2) is therefore to facilitate access to collective bargaining by employees not represented by a bargaining agent. However, in the present case, one fact is undeniable: employees included in the new bargaining unit are already represented by many recognized bargaining agents. This will continue to be the case until the agents are replaced by a new certified bargaining agent. Until then, the bargaining agents must continue to fulfil their duty of fair representation under section 37 and their other obligations under the Code.

The Board sees no reason to depart from the membership support rule imposed on a raiding union as it has been applied since the 1972 amendments; this rule also applies in raid situations where the bargaining unit configuration is altered. Such a change does not fundamentally alter the nature of the application, or the applicable

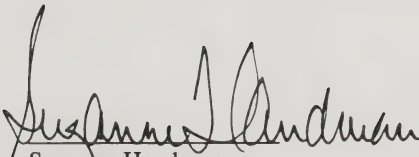
membership support rule. This was the approach taken by the Board in VIA Rail Canada Inc., supra, and the circumstances in the present case are similar.

For all practical purposes, to accept CNTU's interpretation would mean that the industrial peace sought by the membership support rule in raid situations would be jeopardized, since a raiding union with the support of between 35% and 50% of the employees in a unit could require a vote, by convincing the Board that the bargaining unit should be redefined. The Board therefore believes that CNTU's argument cannot serve as the basis for reversing its long-standing membership support rule in raid situations.

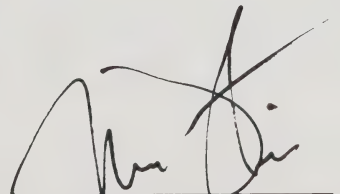
For these reasons, the Board dismisses CNTU's reconsideration application and confirms its August 1, 1995 decision.



Louise Doyon  
Vice-Chair



Suzanne Handman  
Vice-Chair



François Bastien  
Member



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## Summary

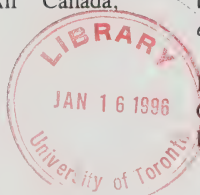
Clare Patricia Fanning, *complainant*, Canadian Union of Public Employees, Airline Division, *respondent*, and Air Canada, *employer*.

Board File: 745-4971  
CLRB/CCRT Decision no. 1149  
December 8, 1995

## Résumé

Clare Patricia Fanning, *plaignante*, Syndicat canadien de la Fonction publique, Division du transport aérien, *intimé*, et Air Canada, *employeur*.

Dossier du Conseil: 745-4971  
CLRB/CCRT Décision n° 1149  
le 8 décembre 1995



Clare Fanning filed a complaint alleging that her union, the Canadian Union of Public Employees, Airline Division, had violated section 37 of the Canada Labour Code by not taking the necessary action to ensure her continued employment with Air Canada, following its introduction of a Voluntary Separation Incentive Program. This program gave eligible employees the opportunity to retire early in exchange for an enhanced severance package.

The Board found nothing in the union's conduct that is contrary to the Code. The union did all that it could to ensure everyone was treated fairly. It was successful at gaining eligibility for several of the employees, including Ms. Fanning, whose applications were originally rejected. When the complainant had second thoughts about the package, the union was able to obtain from the employer an offer that she need not accept the package.

The Board found that the union did not act contrary to the Code when it decided not to proceed with Ms. Fanning's grievances. The

Clare Fanning a déposé une plainte alléguant que son syndicat, le Syndicat canadien de la Fonction publique, Division du transport aérien, avait enfreint l'article 37 du Code canadien du travail en omettant de prendre les mesures nécessaires pour protéger son emploi à Air Canada, après que l'employeur eut mis en oeuvre un programme d'encouragement au départ volontaire. Ce programme donnait aux employés admissibles la possibilité de prendre une retraite anticipée en échange d'une meilleure indemnité de départ.

Selon le Conseil, rien dans la conduite du syndicat ne va à l'encontre du Code. Le syndicat a fait tout ce qu'il pouvait pour s'assurer que tous les employés étaient traités de façon équitable. Il a réussi à obtenir l'admissibilité de bon nombre d'employés, y compris M<sup>me</sup> Fanning, dont les demandes avaient été rejetées au départ. Lorsque la plaignante est revenu sur sa décision, le syndicat a pu obtenir de l'employeur une offre selon laquelle elle n'avait pas besoin d'accepter l'indemnité.

Le Conseil juge que le syndicat n'a pas violé le Code lorsqu'il a décidé de ne pas donner suite aux griefs de la plaignante. Le syndicat

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union has the right to determine whether to refer a grievance to arbitration. Its interpretation of a collective agreement provision, whether it is correct or not, will prevail provided it is not arbitrary, discriminatory or made in bad faith.

a le droit de décider de renvoyer un grief à l'arbitrage. Son interprétation d'une disposition de la convention collective, qu'elle soit juste ou non, aura préséance, pourvu qu'elle ne soit pas arbitraire, discriminatoire ou de mauvaise foi.

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## Reasons for decision

Clare Patricia Fanning,

*complainant,*

*and*

Canadian Union of Public Employees, Airline  
Division,

*respondent,*

*and*

Air Canada,

*employer.*

Board File: 745-4971  
CLRB/CCRT Decision no. 1149  
December 8, 1995

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and Patrick H. Shafer, Members. A hearing was held on August 9 and 10, 1995 at Vancouver, B.C.

### Appearances

Ms. Clare Patricia Fanning, on her own behalf;

Mr. Denis Ellickson, counsel, accompanied by Mr. Barry Kirkness, President, Air Canada Component, for the respondent union; and

Mr. Guy Delisle, counsel, accompanied by Mr. Andrew Toriani, Labour Relations, for the employer.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

Clare Fanning filed a complaint with the Canada Labour Relations Board on December 16, 1994 alleging that her union, the Canadian Union of Public Employees, Airline Division (CUPE), had violated section 37 of the Code, which reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

Ms. Fanning, who began her career as an airline stewardess in 1962 and later worked as a purser, alleges that the union failed to take the necessary action to ensure continued employment with her employer, Air Canada, following its introduction of the Voluntary Separation Incentive Program (VSIP) in March 1994. This program gave eligible employees the opportunity to retire early in exchange for an enhanced severance package. The employer was responsible for determining who was eligible for early retirement. CUPE had no input. She feels that she was not represented during the process, when she filed a grievance over the matter, and when she filed a grievance concerning being denied the opportunity to fly in August.

In April 1994, Ms. Fanning applied to participate in the VSIP program, indicating that she was prepared to retire on July 31, 1994. However, she changed her mind just before the May 2, 1994 deadline, but by then was too late to withdraw and her application remained with the employer.

The employer initially rejected Ms. Fanning's application along with the application of several other employees. These applications were apparently rejected because the applicants had not been on active payroll for 120 days prior to June 1, 1994. Ms. Fanning, during this time, was away on sick leave.

The union got involved in view of the problems created by the program. Not only was it upset because the employer had denied the retirement package to Ms. Fanning and several other employees, but was also concerned about the employer's unilateral action of changing the stated retirement date of successful applicants. CUPE reacted by staging a demonstration on May 17 and 18 at the airport. Ms. Fanning had indicated she was prepared to attend, but did not do so for personal reasons. Her non-attendance upset the local union representative, Mr. Slade, who, as a result, was abrupt in a telephone conversation with her.

Following the demonstration Air Canada reconsidered its position with respect to the rejected VSIP applications and advised Ms. Fanning on July 18, 1994 that her application had been accepted with a retirement date of July 31, 1994. This came as a "complete surprise" to her because by then she had reservations about taking the package. She telephoned Air Canada and stated she was rejecting the offer. The employer told her that there was no other possibility and she was compelled to take the package.

In the meantime, Ms. Fanning learned that she had not been awarded a block of flying time for August. When she called Mr. LeBlanc, the local union president, about this, she also informed him that her VSIP application had been accepted and she was not too happy that the employer was forcing her to take the package. For his part, Mr. LeBlanc was surprised she had bid on a block for August because he thought she was retiring at the end of July. He felt that she had no choice but to accept the package, but told her he would speak to other union representatives at head office in Toronto.

Ms. Fanning then contacted Mr. Godber, the union's Air Canada Component Vice-President. She asked him if she could turn down the package. Mr. Godber did not know, but helped her formulate questions for inclusion in a letter that was sent to the union's Toronto office on July 26, 1994.

According to Mr. Kirkness, the union's Air Canada Component President, he had spoken with Mr. Godber, who asked Mr. Kirkness if he could handle Ms. Fanning's enquiries. Mr. Kirkness said that he spoke with Ms. Fanning on the telephone on two occasions prior to August 4. He also approached the employer following his first telephone conversation and indicated that Ms. Fanning was having problems with the program. However, Mr. Kirkness was unable to tell the company if Ms. Fanning would accept the package as he was unclear himself what she wanted.

Mr. Kirkness was able to secure three alternatives for Ms. Fanning, which he outlined in a letter dated August 4, 1994.

- (1) She could leave at the end of July, as she had originally requested.
- (2) She could delay her departure until the end of September if she so wished.
- (3) She could cancel her participation in the program.

In that letter, he also confirmed there was no remedy available that would give her the August block to which she was entitled based on her seniority. This was because it would require a reassignment, which was not possible at this late date. Mr. Kirkness also approached the company on possible remedies and was advised that it was not prepared to address the issue.

Finally, Mr. Kirkness told Ms. Fanning that insofar as she had refused to tell him which option she wanted, he would advise Air Canada to contact her directly about her choice. He also cautioned her that if she chose option 2 or 3 and refused a reserve flight assignment in August, the employer could possibly take disciplinary action against her.

A few days later, Mr. Wegman of Air Canada telephoned Ms. Fanning. They agreed to meet for lunch at the airport and discuss the retirement package. Mr. Wegman gave her the opportunity to stay until September 30, 1994. According to Ms. Fanning, that was acceptable, but she wished to fly, and was not prepared to spend time on reserve. She felt Mr. Wegman indicated this was okay and she would be flying regularly during August and September.

Ms. Fanning also says she asked Mr. Wegman if the union knew about the employer's offer, and he said "yes", Mr. LeBlanc had approved everything. With this assurance, she proceeded to sign the contract.

*"August 9, 1994*

*Ms. Clare Fanning  
FA. 28679  
7360 Minoru Blvd. #8  
Richmond, B.C.  
V6Y 3L3*

*Clare,*

*This confirms your acceptance of our voluntary separation package for FAs effective September 30 1994.*

*This separation package as accepted is non rescindable. The details concerning your voluntary separation were discussed with you on August 09 1994.*

*I, Clare Fanning accept the voluntary separation package as discussed and reviewed with the undersigned, Mr. J.M. Wegman Customer Service Manager Inflight, West.*

*Signed,*

*Ms. C. Fanning  
FA 28679*

*Signed,*

*Mr. J.M. Wegman  
Customer Service*

*Manager, Inflight*

*Vancouver August 09 1994.*

*c.c. CUPE YVR."*

Ms. Fanning tried on several occasions to contact Mr. Wegman about the promised work opportunities. She did get four days' work from September 6 to 9. However, she did not work as a flight attendant, but was assigned to clear up a backlog of commendation letters.

During this time, she became aware that other flight attendants who had signed non-rescindable VSIP documents and who were scheduled to leave Air Canada on September 30, 1994 were asked to stay on until the end of 1994. She tried unsuccessfully, through discussions with Mr. Wegman, to find out why she too was not asked to stay until the end of the year. When she received no satisfaction she wrote to Mr. Wegman on September 30.

On September 26, 1994, Ms. Fanning wrote to the local union officers enquiring whether she could file a grievance because her employment was not being extended until the end of 1994. On September 30, she wrote Mr. Kirkness requesting that the union file a grievance concerning this matter. She also made several attempts to contact the union and employer by phone.

On October 6, Mr. Kirkness sent her a letter, indicating that the union would not file a grievance concerning this matter. He explained that she had signed a non-rescindable document. While it was true that some individuals were approached to delay their retirement, there was nothing the union could do as this matter was not contemplated in the collective agreement, and therefore no grievance was possible.

Mr. Kirkness wrote to Ms. Fanning again on October 11, reiterating the union's position. He also provided information on how she could go about appealing the decision.

Further correspondence continued between Ms. Fanning, the employer and the union; this included an indication of her intention to appeal the union's decision. On December 20, 1994, she received a letter from the union indicating that her appeal had been rejected. And on December 16, she filed this complaint with the Board.

In dealing with the complaint concerning the loss of the August block, the Board finds it is untimely. Section 97(2) of the Code states:

*"Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

Compliance with the provisions of section 97(2) is strictly required. See Mike Sheehan (1980), 40 di 103; [1980] 2 Can LRBR 278; and 80 CLLC 16,030 (CLRB no. 242).

Ms. Fanning knew at the latest by August 9, 1994 that the union would not file a grievance on her behalf concerning the August block. To be timely, the complaint would have had to be filed within 90 days of August 9. By filing her complaint on December 16, 1994, she was outside the time limits. Her complaint in that regard is therefore dismissed.

Her complaint concerning the August block also has no merit. Ms. Fanning has a disagreement with the union over the interpretation of the collective agreement. In

Peter Klippenstein (1991), 86 di 33 (CLRB no. 889), the Board said the following regarding a union's decision not to proceed with a grievance:

*"It is a union's prerogative whether to file a grievance or not and this Board will not intervene unless such a decision is arbitrary or tainted with bad faith, gross negligence, discrimination, hostility or other such unlawful motive. Even if a union is wrong in the opinion of the Board when it decides not to proceed with a grievance, this is not sufficient grounds for the Board's intervention provided the decision was made in good faith. ..."*

(page 36)

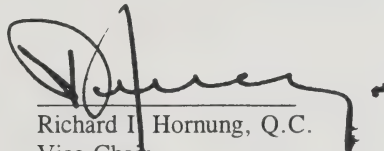
Although the complainant is completely dissatisfied with the union's handling of the matter concerning the retirement package and its lack of representation, the Board finds nothing in the union's conduct that is contrary to the Code. The union did all it could to ensure everyone was treated equally. It was successful at gaining eligibility for several of the employees, including Ms. Fanning, whose applications were originally rejected. When the complainant had second thoughts about the package, Mr. Kirkness was able to obtain an offer from the employer, that she need not accept it.

Ms. Fanning was satisfied with the package until she found out that other flight attendants were invited to work until the end of the year and she was not. She then began to ask for the same consideration. Once again, the union, after conducting an investigation, deemed that the matter was not arbitrable.

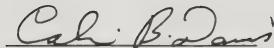
The union has the right to determine whether to refer a grievance to arbitration. Its interpretation of a collective agreement provision, whether it is correct or not, will prevail, provided it is not arbitrary, discriminatory or made in bad faith (see Peter Klippenstein, supra; Garry Lloyd Ager (1991), 85 di 115 (CLRB no. 875); Ken Silver

et al. (1991), 85 di 145 (CLRB no. 877); and Gino Giammarino (1993), 93 di 145 (CLRB no. 1047)).

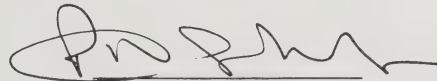
We find that the union turned its mind to the merits of the grievance before making its decision and did not act in a manner that was arbitrary, discriminatory or in bad faith. We are therefore satisfied that the union in reaching its decision not to proceed to arbitration did not violate the provisions of the Code. Accordingly, the complaint is dismissed.



Richard I. Hornung, Q.C.  
Vice-Chair



Calvin B. Davis  
Member



Patrick H. Shafer  
Member



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## Summary

Pulp, Paper and Woodworkers of Canada, Local 26 (Selkirk College), *applicant*, and Selair Pilots Association, *respondent*.

Board File: 555-3816  
CLRB/CCRT Decision no. 1150  
December 27, 1995

## Résumé

Pulp, Paper and Woodworkers of Canada, section locale 26 (Selkirk College), *requérant*, et Selair Pilots Association, *intimée*.

Dossier du Conseil: 555-3816  
CLRB/CCRT Décision n° 1150  
le 27 décembre 1995

The union filed a certification application for a unit of all aircraft maintenance engineers employed by Selkirk College. There were two such employees at the time of application. Selkirk College and Selair Pilots Association object to the application on three separate grounds. First, the College alleges that Selair and not Selkirk College is the true employer. Second, Selair argues that one of the persons concerned must be excluded from the bargaining unit because he is a manager. Third, Selair argues in the alternative, that if the individual is an employee under section 3(1) of the Code, it is inappropriate to place him in the same bargaining unit with his immediate subordinate.

The Board found that Selair is the true employer because it has control over the performance of the work and is responsible for ensuring compliance with federal regulations and requirements while the College has no control over these matters.

The Board further found that the limited supervisory duties of Mr. Lowe do not make him a manager and thereby exclude him from collective bargaining.

Le syndicat a présenté une demande d'accréditation à l'égard d'une unité de mécaniciens d'entretien d'aéronefs qui travaillent au Selkirk College. À la présentation de la demande, il n'y avait que deux mécaniciens d'entretien. Le Selkirk College et Selair Pilots Association s'opposent à la demande pour trois motifs distincts. Premièrement, le collègue allègue que Selair et non le Selkirk College est le véritable employeur. Deuxièmement, Selair prétend qu'un des individus en cause doit être exclu de l'unité parce qu'il est gestionnaire. Troisièmement, Selair prétend subsidiairement que, si l'individu est un employé au sens du paragraphe 3(1) du Code, il ne convient pas de le placer dans la même unité de négociation que son subalterne immédiat.

Le Conseil juge que Selair est le véritable employeur parce qu'elle exerce un contrôle sur l'exécution du travail et est chargée de veiller au respect des exigences et règlements gouvernementaux et que le collègue n'exerce aucun contrôle à cet égard.

En outre, le Conseil juge que les quelques fonctions de supervision qu'exerce M. Lowe ne font pas de cet employé un superviseur et, par conséquent, ne l'excluent pas de la négociation collective.

Finally, the Board considered a separate supervisory unit to be inappropriate in the particular circumstances of this case. While the usual policy of the Board is to place supervisors in separate bargaining units from those whom they supervise, this policy is subject to exceptions. Section 27(5) specifically provides for the inclusion of both supervisory and non-supervisory employees in the same unit. In deciding whether to include supervisors with those they supervise, the Board will weigh a number of factors including the degree of conflict likely to be engendered and the viability of a bargaining unit. In cases where units would consist of only a few members, the Board has held it to be appropriate to include supervisors with other employees.

In the present case, there is no sound basis for excluding the supervisor from the bargaining unit. The nature of the supervision is largely professional and technical and the effect of excluding the supervisory employee from the unit, as requested by Selair, would be to deny both employees access to collective bargaining. In the absence of imperative labour relations reasons, such a result runs contrary to the intent and spirit of the Labour Code.

The Board, having found the proposed bargaining unit appropriate for collective bargaining and that all the employees wish to be represented by the applicant union, issued a certification order.

Enfin, le Conseil estime qu'une unité de supervision distincte n'est pas appropriée dans les circonstances de la présente affaire. Même si, en vertu de la politique du Conseil, les superviseurs ne font habituellement pas partie de l'unité des employés qu'ils supervisent, il y a des exceptions. Le paragraphe 27(5) prévoit précisément l'inclusion d'employés de supervision et d'employés d'exécution dans une même unité. Lorsqu'il doit décider s'il regroupera les superviseurs et les employés qu'ils supervisent, le Conseil tient compte d'un certain nombre de facteurs, y compris les conflits qui pourraient surgir et la viabilité de l'unité de négociation. Dans les cas où les unités ne comprendraient que quelques membres, le Conseil a jugé qu'il y avait lieu de regrouper les superviseurs et d'autres employés.

En l'espèce, il n'y a pas de motif valable pour exclure le superviseur de l'unité de négociation. Le type de supervision exercée relève en grande partie du domaine professionnel et technique. Exclure le superviseur de l'unité, comme le demandait Selair, aurait pour effet d'empêcher les deux employés d'avoir accès à la négociation collective. En l'absence de raisons impérieuses liées aux relations de travail, une telle décision irait à l'encontre de l'intention et de l'esprit du Code du travail.

Ayant jugé que l'unité de négociation proposée est habile à négocier collectivement et que tous les employés veulent être représentés par le syndicat requérant, le Conseil a rendu une ordonnance d'accréditation.

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## Reasons for decision

Pulp, Paper and Woodworkers of Canada,  
Local No. 26 (Selkirk College),

*applicant,*

*and*

Selair Pilots Association,

*respondent.*

Board File: 555-3816  
CLRB/CCRT Decision no. 1150  
December 27, 1995

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Messrs. François Bastien and Patrick H. Shafer, Members.

### Counsel on Record

Mr. Geoffrey J. Litherland, for Selair Pilots Association; and

Mr. Donald W. Bobert, for Pulp, Paper and Woodworkers of Canada, Local No. 26 (Selkirk College).

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

### **I - Nature of the Application**

These reasons for decision concern an application for certification filed pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations) by the Pulp, Paper and Woodworkers of Canada, Local No. 26 (Selkirk College), (the "Union"). The certification sought by the union is for a unit of all aircraft maintenance engineers employed by Selkirk College.

At the time this application was filed, the applicant requested that the Canada Labour Relations Board hold its application in abeyance pending a determination of a similar application by the British Columbia Labour Relations Board. The request for certification before the B.C. Board was contested by Selkirk College as well as by a pilots association. Selkirk took the position that it was not the employer of the employees concerned and claimed the true employer was Selair Pilots Association, a non-profit society which provides and maintains aircraft used in the College's Aviation Technology Program. Selair, on the other hand, disputed the jurisdiction of the B.C. Labour Relations Board claiming that its operations are a federal work, undertaking or business within the meaning of section 2 of the Canada Labour Code.

The B.C. Labour Relations Board rendered its decision on January 20, 1995 (see Selair Pilots Association, no. B17/95, January 20, 1995 (BCLRB)). It did not determine the identity of the employer, having concluded that it was not necessary to do so. It declared that the aeronautical operation being performed by Selair is severable from the rest of the College's activities in terms of constitutional jurisdiction. Consequently, even if Selkirk College were found to be the true employer of the employees from a labour relations perspective, the aeronautical activities of Selair in which these employees are engaged, being severable from the operation of the College, fall under federal jurisdiction.

This Board agrees with the determination made by the B.C. Board concerning both the question of the severability of Selair's activities (see J.C. Fibers Inc. (1994), 94 di 1 (CLRB no. 1057); and Canada Post Corporation and Nieman's Pharmacy (1989), 77 di 181; and 4 CLRBR (2d) 161 (CLRB no. 742)) and the fact that the field of aeronautics comes within the domain of federal competence (see Innotech Aviation Limited (1993), 92 di 62 (CLRB no. 1018); E.S.F. Limited, doing business as Esso Avitat (1992), 88 di 185 (CLRB no. 949); North Canada Air Ltd. and Norcanair Electronics Ltd. (1979), 38 di 168; and [1980] 1 Can LRBR 535 (CLRB no. 222); Butler Aviation of Canada Limited (1974), 7 di 14; [1975] 1 Can LRBR 321; and 75 CLLC 16,156 (CLRB no. 35)). However, the question of the true identity of the

employer was not settled by the B.C. Board and remains in issue in this application. The second issue to be dealt with concerns the status of one of the persons in the proposed bargaining unit who, according to Selair, must be excluded from collective bargaining because he is a manager. In the alternative, Selair submits, if the Board finds this person to be an employee, he exercises supervisory functions and is inappropriately placed in a bargaining unit which includes his immediate subordinate.

The Board received submissions from the parties and, in accordance with its usual practice, disposed of the application on the basis of the documentation on file and the report of the Board's labour relations officer without holding a public hearing (see Alberta Wheat Pool (1991), 86 di 172 (CLRB no. 907)). A certification order was issued with reasons to follow. These are the reasons.

## **II - Background**

Selkirk College is an educational institution situated at Castlegar in southeastern British Columbia. Amongst the post-secondary programs it offers is that of Aviation Technology. The College has no licence or authority to perform flight operations pursuant to its education licence. The aircraft used in the Program are provided and maintained by Selair Pilots Association, a non-profit society. Selair, having the requisite licences from the federal government, is in a position to perform the training activities involved.

Selair, a separate legal entity from Selkirk College, operates pursuant to its own By-laws and Constitution. According to Selair, it employs two persons, Richard Lowe and Jim Sofonoff. Mr. Lowe holds several positions including that of Director of Maintenance which Selair is required to fill as a condition of its Approved Maintenance Organization. The president of Selair is Robert Evans. He also holds the title of Chief Flight Instructor and is the Department Head of the Aviation Technology Faculty at Selkirk College. The other officers of Selair are members of the Faculty

at Selkirk and all members of Selair are either members of the faculty or students in the Aviation Technology Program at Selkirk.

Selair operates pursuant to the Standards and Procedures for Flight Training Units contained in the Personnel Licensing Handbook issued by Transport Canada.

Selair owns seven aircraft based at Castlegar Airport for use by Selkirk in its Aviation Technology Program. The logo on two of the aircraft reads "Selkirk College Aviation Technology". Maintenance of the aircraft is carried out in a hangar leased by Selair from Selkirk College. It is performed in accordance with Selair's Maintenance Control Manual. This manual is approved by Transport Canada and is consistent with the requirements of Transport Canada's Airworthiness Manual. The maintenance department is required to perform routine inspections, maintenance, and testing of aircraft, and keep records of all of these activities. When the manufacture of parts or repairs are not covered by their Manual, approval for such repairs or manufacture of parts must be approved by Transport Canada.

In the event that maintenance is performed on Selair aircraft outside Canada, Mr. Lowe, as Director of Maintenance for Selair, must insure that the work is performed by an acceptable organization in accordance with an agreement between Canada and another state or directly supervise and certify the work according to Selair's Maintenance Control Manual.

Students enrolled in the Aviation Technology Program pay a tuition fee which goes directly to Selkirk College. In addition, they pay student fees as well as an hourly fee for the use of aircraft. The hourly fee is distributed into a number of accounts including one used for the payment of maintenance expenses. Selair's payroll is directly funded by the fees it receives from the pilot trainees in the program and the pay cheques of Mr. Lowe and Mr. Sofonoff are issued by Selair.

The facilities of Selair consist of two buildings and a hangar at Castlegar Airport, all of which are owned by Selkirk College Aviation Technology and bear its name. Building no. 1 contains the offices of the receptionist and clerk for Selair who is an employee of the College and a member of the Union's bargaining unit at the College. This employee's duties include preparing and maintaining financial records for Selair, handling payroll requirements for Selair, and inputting data for inventory control of Selair maintenance. There are also offices for Mr. Evans and some of the other members of the Selkirk Aviation Faculty, a classroom, and two simulator rooms. Building no. 2 houses the flight dispatch office where students of the program perform the dispatch function. It also contains faculty member offices. The hangar contains the maintenance operation. This is where Lowe and Sofonoff principally perform their work. The custodial work and maintenance at both buildings and the maintenance of the hangar is performed by Selkirk employees who are members of the Union's bargaining unit at the College.

With respect to equipment, at least 80% of the tools used by Mr. Lowe and Mr. Sofonoff are owned by Selkirk. In the acquisition of tools, Mr. Lowe has dealt with the purchasing department of Selkirk, identifying what was required and obtaining the tools through the College's purchase orders. Office supplies for Selair are also obtained through Selkirk on a regular basis. Mr. Lowe has been authorized to sign for these supplies at Selkirk Bookstore on behalf of the "Aviation Department". In addition, Mr. Lowe has on occasion procured hangar supplies from the College.

Mr. Lowe has performed duties for Selkirk College. On one occasion, at the request of a carpenter in the College's Maintenance Department, he did some stainless steel welding for use in the College cafeteria. As for social activities, both Mr. Lowe and Mr. Sofonoff are regularly invited to functions of both the employees and faculty of Selkirk.

### III - The True Employer

The issue of identifying the true employer is not new. The Board has dealt with this question on many occasions. (See Kent Line Limited (1972), 72 CLLC 16,062 (Old CLRB no. 114); Canadian Offshore Marine Limited et al. (1973), 1 di 20; and 74 CLLC 16,089 (CLRB no. 3); Northern Television Systems Ltd. (1976), 14 di 136; and 76 CLLC 16,031 (CLRB no. 64); MacCosham Van Lines Limited (1979), 34 di 716; and [1979] 1 Can LRBR 498 (CLRB no. 177); Urbain et Chartrand Inc. (1985), 55 di 257 (CLRB no. 508); Nationair (Nolisair International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630); Canadian Broadcasting Corporation (Ciné le Matou Inc.) (1987), 71 di 12 (CLRB no. 646); Transport Bélanger Lemire Inc. et al. (1990), 79 di 165 (CLRB no. 777); and Economy Carriers Limited et al. (1991), 86 di 209 (CLRB no. 910).)

More recently, in the case of Nationair (Nolisair International Inc.), *supra*, the Board reiterated the relevant factors to be considered. Following a review of the jurisprudence, the Board set out the following criteria as being significant in determining the identity of the employer:

- "1. ... significant weight cannot be given to the payment of wages. ... More significant will be the identification of the person who does the paying, who ultimately bears the cost, and the impact this has on the employment relationship.*
- 2. Another indicator will surely be the person who controls access to employment: the person who hires or who gives the work to be performed. ...*
- 3. A third criterion concerns the actual establishment of working conditions. Who actually establishes working conditions? ...*
- 4. Another criterion concerns the actual performance of work. How is the work performed on a day-to-day basis? Who assigns the work? Who in fact determines and approves the*

*standards governing the performance of the work? In this regard, who has the last word, the final say? ...*

5. *Other criteria may also assist the Board in its determination: the employees' perception, their identification with the company, their degree of integration into the company, ..."*

(pages 74-75; and 110-111)

The Board has pointed out that while the significance of these criteria may vary from case to case, it is essential in their application not to lose sight of the purpose of the legislation, namely to promote access to collective bargaining.

Both Selair and the Union agree with the principles set out above. The Union, however, maintains that, based upon the established criteria, Selkirk College and not Selair is the employer. The Union considers Selair as an integral and indivisible part of Selkirk College's Aviation Program and submits that Selair exists only to maintain aircraft used by Selkirk College in its aviation technology program. In its view, Selair is not a separate undertaking with an independent purpose; its very purpose is Selkirk.

As already indicated, the Board concurs with the decision rendered by the British Columbia Labour Relations Board in which it concluded that the activities of Selair are severable from the rest of the College's activities. As for the issue as to who is the true employer, the material facts point to Selair.

It is Selair which pays the employees in question and is responsible for the financing of its payroll and operating costs. Selair's payroll is derived from fees it receives directly from pilot trainees. The fees paid by the trainees not only pay the wages of Messrs. Lowe and Sofonoff but are also directed towards the cost of operating Selair as a Flight Training Unit and cover Selair's maintenance expenses.

Selair hires its employees and ensures they have the requisite qualifications to perform their work. It also trains its employees in accordance with the governing Airworthiness Manual. The direction and control of the work of Messrs. Lowe and Sofonoff as well as the evaluation of their work is effected by Selair. It is also Selair which determines their hours of work, vacation, and overtime requirements.

The evidence indicates that the College does not direct or control either the employees or the work in question. Indeed, it is Selair and not Selkirk College which has the authority and responsibility to ensure operational compliance with the federal regulations and requirements.

Selair operates pursuant to federal legislation, licences, and approved manuals. With respect to licensing requirements, Selair holds the Air Carrier Operating Certificate and the Certificate of Approval for its Aircraft Maintenance Organization which are issued by Transport Canada. Selair is responsible for obtaining the requisite licences. It is also responsible for ensuring that maintenance activities are performed in accordance with its Maintenance Control Manual. Furthermore, it must ensure that its personnel have the necessary qualifications, that a quality assurance system is established, and that training requirements are met as foreseen by the Airworthiness Manual. In sum, it is Selair that is responsible for ensuring that federal aviation requirements are respected and that the flying operation is maintained.

For all these reasons, the Board concludes that the true employer of Messrs. Lowe and Sodonoff is Selair.

#### **IV - The Management Exclusion**

Selair has adopted the position that Richard Lowe is not an employee within the meaning of the Code since he exercises management functions. As a result, it maintains that the Union does not have the requisite two employees for the proposed bargaining unit.

Selair provided the Board with extensive and detailed information concerning Mr. Lowe's functions and responsibilities to support its contention that he be excluded from the bargaining unit.

Mr. Lowe holds the titles of Director of Maintenance, Quality Assurance Manager, Production Manager, Chief Maintenance Engineer as well as Storekeeper, Aircraft Maintenance Engineer, and Certified Welder.

Decisions to hire and lay off the junior employee are made jointly by Mr. Lowe and by Mr. Evans, the President. With respect to discipline, while Mr. Lowe has initial responsibility in this area, matters which might result in summary dismissal are discussed with the President and, if necessary, the Association Executive.

Mr. Lowe is responsible for the maintenance organization. As such, he evaluates the performance of maintenance staff he supervises. He has the authority to prevent an unsatisfactory employee from working on an aircraft and can restrict the employment duties of the junior employee in relation to the Aircraft Maintenance Organization. As in the case of discipline, major personnel matters are dealt with by both Mr. Lowe and Mr. Evans, and if necessary, by the Association Executive.

Mr. Lowe, as Director of Maintenance, is responsible for the assignment and supervision of work as well as the priority in which it is performed. He has the authority to remove an aircraft from service but because of its impact upon flight operations he would consult with Mr. Evans with respect to such a decision. He also has authority to make final decisions on issues involving aircraft maintenance.

As Director of Maintenance, Quality Control Manager, and Production Manager, Mr. Lowe has responsibility for the development and enforcement of policies and work rules as well as for production and safety standards.

Mr. Lowe is responsible for ensuring the availability of sufficient tools and equipment for maintenance and inspection purposes. Major purchases are co-ordinated with the President and Association Executive.

Mr. Lowe is responsible for orientation and training activities but requires budget approval from the President and possibly the Association Executive if there are major financial implications to these activities. While the preparation of the budget is the responsibility of the President, Mr. Lowe participates in the process by providing budgetary information relating to the maintenance operation.

In addition to all the foregoing responsibilities, Mr. Lowe also carries out maintenance and repair work. His performance of such functions is necessary due to the small size of Selair's operations.

To further support its proposed exclusion of Mr. Lowe from the bargaining unit, Selair pointed to the industry practice with respect to such a management exclusion. It claims that in the aviation and airline industry, it is a common practice to exclude personnel who perform even a few management functions due to the specialized nature of the work, the many regulatory conditions, and the safety issues involved. Selair provided examples from a number of airlines where the Director of Maintenance or persons holding the same positions as Mr. Lowe have been excluded from the bargaining unit. The rationale for such a practice, according to Selair, is that as a result of the statutory responsibilities they perform on behalf of the employer they would be in a conflict of interest if they belonged to a union. The inclusion of Mr. Lowe in the proposed unit would result in a loss of an individual in the maintenance shop who can carry out the management functions required by Transport Canada.

The Union disputes Selair's categorization of Mr. Lowe as a manager. It claims that the exercise of technical judgment does not render him excluded nor do his alleged "management" functions. The Union claims he has not been involved in the hiring

process nor in the evaluations of Mr. Sofonoff; he has no authority to implement decisions in the area of firing and discipline; he does not regularly attend management meetings, has no input into the budgetary process, and has not participated in the establishment of policies for Selair.

According to the Union, Selair's submissions with respect to the industry practice are not applicable since Selair is involved in aircraft maintenance and not in the running of an airline. It further submits that the title of "manager" held pursuant to Transport Canada Regulations does not result in being a manager within the meaning of the Canada Labour Code.

There is no precise definition of a manager. However, on numerous occasions, the Board has set out a list of functions which it considers as constituting managerial authority. In British Columbia Telephone Company (1977), 33 di 361; [1977] 2 Can LRBR 385; and 77 CLLC 16,107 (CLRB no. 98), for example, those functions which the Board recognized as being management functions were described as follows:

*"... the preparation of the budget, decisions as to the organization of the enterprise and staffing levels, the representation of the employer in collective bargaining or in contract administration, the formulation of corporate policy, the hiring, firing, promoting and disciplining of employees, authorizing time off or overtime, etc. Some of these functions are so important that they warrant a finding that a person performs management functions even if that person exercises only a few of these functions or does so only infrequently. Others are of lesser import and will not warrant a finding that a person performs management functions unless they represent a major component of the person's job."*

(pages 376; 396; and 650)

A key indicator in determining whether or not an individual exercises management functions is the existence of the power to decide. The Board has made a clear distinction between the power to effectively recommend and the power to decide. To fall within the managerial exclusion, more than input into the decision-making process

is required; the individual must have the actual authority to decide and the decision must be determinative. (See British Columbia Telephone Company, *supra*; and Atomic Energy of Canada Limited (1978), 33 di 415; and [1979] 1 Can LRBR 252 (CLRB no. 156).)

Similarly, in the absence of decision-making authority, the provision of expert advice or the exercise of expertise does not result in a management exclusion. The Board in the case of Island Telephone Company Limited (1990), 81 di 126 (CLRB no. 811), expressed itself as follows with respect to this issue:

*"Decision-making authority, not complex or expert knowledge, constitutes a proper basis for management exclusion. This is, in fact, a corollary of the previous observation. Proximity to employment relations is but one axis of the definition of management function; real decision-making is the other. To be involved in important decisions or in key areas of a company's operations through the provision of expert advice or technical knowledge is one thing; to use it to actual employment relations effect is another. In British Columbia Telephone Company (1976), 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC 16,015 (CLRB no. 58), the Board has commented extensively on the nature of this critical difference noting that, under the Code, 'the performance of functions of a highly technical or professional nature is not a bar to the inclusion in a bargaining unit' (pages 265; 281; and 467). ..."*

(page 131)

Selair has alleged that Mr. Lowe exercises management authority. However, close scrutiny of his duties shows that he does not have autonomous decision-making authority that would render him a manager within the meaning of the Code.

While Mr. Lowe may have initial disciplinary authority (which he has never exercised), authority with respect to lay-offs, employee conduct and performance, orientation and training, as well as spending, such authority is both limited and subordinate. Major personnel matters are dealt with not only by the President, Mr. Evans, but if necessary by the Association Executive as well. Major purchases

and all other decisions involving any significant expenditures must also be submitted to the President and possibly the Association Executive.

It is not questioned that Mr. Lowe has expertise in the area of aircraft maintenance and performs work of a highly technical nature. However, his expert knowledge and his responsibilities for such activities as airworthiness and meeting production and safety standards do not make him a manager and exclude him from collective bargaining.

Given the absence of substantive responsibilities in policy or decision making, the Board concludes that Mr. Lowe does not exercise managerial functions.

As for Selair's arguments based on industry practice, this criterion may be considered in determining the appropriateness of the bargaining unit. However, it does not operate to exclude a person from the bargaining unit, based on his or her employee status.

## **V - The Appropriateness of the Bargaining Unit**

Given the Board's findings above, it becomes necessary to treat the subsidiary question of the appropriateness of the bargaining unit. Selair submits that the proposed bargaining unit is inappropriate due to the fact that Mr. Lowe supervises Mr. Sofonoff and evaluates his job performance. In support of this position Selair refers again to the airline industry and, in particular, to cases involving aviation and airline companies where the Board has excluded supervisory personnel from the bargaining unit of employees they supervise. Selair acknowledges that a finding by the Board that Mr. Lowe be excluded from the bargaining unit would defeat the application since the bargaining unit would then consist of only one employee. However, Selair claims it should not have to reorganize its management structure and decision-making process to accommodate the Union's wishes.

The Union takes issue with the characterization of Selair's activities as an airline and argues that Selair's vocation is aircraft maintenance. The Union maintains that the employer's argument on this point constitutes nothing other than an attempt to deny the concerned employees access to collective bargaining.

The Code expressly provides for the certification of a bargaining agent to represent persons who supervise others but whose core functions are not sufficiently managerial to be excluded from collective bargaining. Section 27(5) states:

*"Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining."*

Section 27(2) provides that:

*"In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union."*

The Board, while recognizing the right of supervisors to bargain collectively, has generally placed them in their own bargaining unit. This practice has developed to allay the concern for perceived conflicts of interest. (See Canadian Broadcasting Corporation (1994), 96 di 1 (CLRB no. 1091); Canada Ports Corporation (1993), 92 di 211; 21 CLRB (2d) 281; and 94 CLLC 16,003 (CLRB no. 1031); Canadian Broadcasting Corporation (1991), 84 di 1 (CLRB no. 846); Island Telephone Company Limited, *supra*; Canadian Broadcasting Corporation (1984), 55 di 197 (CLRB no. 461); Pacific Western Airlines Ltd. (1983), 52 di 56 (CLRB no. 416); CFTO-TV Limited (1981), 45 di 306 (CLRB no. 345).)

However, the creation of separate supervisory units, while usual, is not mandatory. The Code does not prohibit the certification of a bargaining unit comprised of both

supervisors and those whom they supervise. Section 27(5) specifically provides, moreover, for the inclusion of both supervisory and non-supervisory employees in the same unit. This fact was expressed by the Board in General Aviation Services Limited, (1979), 34 di 791; and [1979] 2 Can LRBR 98 (CLRB no. 182), as follows:

*"In determining an appropriate bargaining unit the Board has the discretion of either certifying a unit made up exclusively of supervisory employees or one in which they are included along with other employees. There is no legislative prohibition against certifying a bargaining unit which contains both supervisors and those they supervise. The Woods Task Force recommended that supervisors be eligible for bargaining rights but should not be represented by the same bargaining agent that represents the employees they supervise. This recommendation was not followed by the Parliament of Canada when Section 125(4) (now Section 27(5)) was introduced into the Code in 1972. Parliament expressly allowed supervisors and other employees to be part of the same bargaining unit and consequently represented by the same bargaining agent. ..."*

(pages 797; and 103)

In deciding whether or not to include or exclude supervisory employees with those they supervise, the Board has considered whether or not supervisory employees would be denied bargaining rights, the effects of creating a separate supervisory unit, the degree of conflict a single unit would create, the limitations imposed on the employer's ability to operate efficiently as well as the effect on harmonious industrial relations (see Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91); Verreault Maritime Inc. (1993), 92 di 29 (CLRB no. 1013); Western Manitoba Broadcasters Limited (1991); 85 di 120 (CLRB no. 876); Canadian Broadcasting Corporation (461), *supra*; Pacific Western Airlines Ltd., *supra*; and Canadian Imperial Bank of Commerce (1986), 64 di 89 (CLRB no. 557)).

The Board has also taken into consideration the size of an enterprise and the viability of units consisting of only a few members. In such cases, the Board has held that it is appropriate to include supervisors with other employees in the same unit as long as

this does not result in serious conflicts of interest (see CFTO-TV Limited, *supra*; Verreault Maritime Inc., *supra*; and Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661)).

In the present case, the Board concludes that there is no sound basis for excluding Mr. Lowe from the bargaining unit. The authority exercised by Mr. Lowe over Mr. Sofonoff is primarily of a professional and technical nature. Those supervisory functions that are performed will not, in the Board's view, create a conflict of interest nor impact negatively on Selair's activities.

Most importantly, the size of Selair's operations and the number of employees concerned simply do not permit the creation of a viable separate supervisory bargaining unit. Moreover, excluding Mr. Lowe from the bargaining unit would not only deny bargaining rights to Mr. Lowe but to Mr. Sofonoff as well. In the absence of any imperative labour relations reasons, it seems clear that such a result runs contrary to the intent and spirit of the Labour Code.

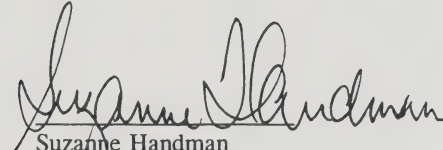
The Board is not satisfied that the specificity of the airline or aircraft maintenance industry warrants a different conclusion. The Board's general policy on conflicts of interest within bargaining units is not particular to any given industry. As already indicated, supervisors are most often placed in their own unit. However, for the reasons outlined above and, in particular, given that a separate unit would preclude access to collective bargaining, a separate unit in such circumstances is not appropriate. The Board considers that the appropriate unit in the present case comprises both aircraft maintenance employees working for Selair.

## **VI - Conclusions**


The Board, having found that the proposed bargaining unit is appropriate for collective bargaining, and that all the employees in the unit wish to have the applicant

represent them, certified Pulp, Paper and Woodworkers of Canada, Local No. 26 (Selkirk College), to represent a unit described as follows:


*"All aircraft maintenance employees of Selair Pilots Association".*



Suzanne Handman  
Vice-Chair



François Bastien  
Member



Patrick H. Shafer  
Member



# Information

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## Summary

Judah (Joe) Zegman, *complainant*, Canadian Telephone Employees' Association, *respondent*, and Bell Canada, employer.

Board File: 745-5023  
CLRB/CCRT Decision no. 1151  
January 10, 1996

The complaint alleged that the respondent Union violated section 37 of the Canada Labour Code by failing to represent the complainant with respect to a series of grievances. However, at the hearing a very different story emerged.

The complainant testified that he suffered from a drug addiction and wished to be sent to a facility where other employees had received treatment. He claimed that the Union was aware of his addiction and, despite his requests for help, refused to provide him with any assistance. In his view, he had been treated differently from others with similar problems and attributed this difference in treatment to racial discrimination.

The complainant was subsequently dismissed for failing to provide medical certification required by the company.

## Résumé

Judah (Joe) Zegman, *plaignant*, Association canadienne des employés de téléphone, *intimée*, et Bell Canada, employeur.

Dossier du Conseil: 745-5023  
CLRB/CCRT Décision n° 1151  
le 10 janvier 1996

Selon la plainte, le syndicat intimé aurait enfreint l'article 37 du Code canadien du travail, en ne représentant pas le plaignant en ce qui a trait à une série de griefs. Cependant, lors de l'audience, l'histoire s'est révélée toute autre.

Le plaignant affirme dans son témoignage qu'il souffrait de toxicomanie et voulait être envoyé dans l'établissement où d'autres employés avaient été traités. Il prétend que le syndicat était au courant de sa toxicomanie et que, malgré ses demandes, le syndicat ne lui avait pas fourni d'aide. Selon le plaignant, il aurait été traité différemment d'autres personnes qui souffraient des mêmes problèmes, et ce, en raison de discrimination raciale.

Le plaignant a ensuite été congédié parce qu'il n'avait pas fourni le certificat médical que demandait l'employeur.



The Board assessed the contradictory testimony regarding the pursuit of the complainant's grievances in favour of the Union and concludes that the complainant had instructed the Union not to proceed to arbitration. This being the case, the Union did not violate section 37 in not pursuing the grievances in question.

As for the alleged discriminatory behaviour by the Union with respect to the complainant's addiction and need for medical attention, the existing employee assistance program does not form part of the collective agreement. Consequently, no finding can be made in virtue of section 37 of the Code since this provision applies only to those rights which come under the collective agreement. Even if a grievance could be based upon other provisions, the complainant had not filed a grievance contesting the non-provision of treatment.

Despite the absence of any grievance, the Union arranged for the complainant to present his problem to management. He was referred to the company's medical department. While the referral did not result in treatment, the complainant failed to inform the Union officers of his dissatisfaction. Finally, the complainant did not heed the Union's suggestion that he provide the company with the medical documentation it required nor did he contest his dismissal.

In the circumstances of this case, the Union's actions cannot be found to be contrary to section 37 of the Code.

The complaint is dismissed.

Le Conseil évalue les témoignages contradictoires au sujet de la poursuite des griefs du plaignant par le syndicat et accepte la version du syndicat; il conclut également que le plaignant avait dit au syndicat de ne pas porter son grief à l'arbitrage. Dans ce cas, le syndicat n'a pas enfreint l'article 37 en ne donnant pas suite aux griefs en cause.

En ce qui a trait au comportement prétendument discriminatoire du syndicat à l'égard de la dépendance du plaignant et de ses besoins médicaux, le programme d'aide aux employés existant ne fait pas partie de la convention collective. Il est donc impossible de rendre une décision fondée sur l'article 37 puisque ce dernier ne s'applique qu'aux droits découlant de la négociation collective. Même si un grief pouvait être fondé sur d'autres dispositions, le plaignant n'a pas déposé de grief pour contester le fait qu'il n'avait pas reçu de traitement.

Même si aucun grief n'avait été déposé, le syndicat a pris des arrangements pour que le plaignant puisse présenter son problème à la direction. On a alors renvoyé le plaignant à la division médicale de l'employeur. Bien qu'aucun traitement n'ait été prescrit à la suite de ce renvoi, le plaignant n'a pas fait part de son insatisfaction au syndicat. Enfin, le plaignant n'a pas tenu compte de la suggestion du syndicat qui lui conseillait de fournir le document médical que demandait l'employeur et il n'a pas non plus contesté son congédiement.

Dans les circonstances, il n'est pas possible de conclure que le syndicat a agi de façon contraire à l'article 37 du Code.

La plainte est rejetée.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

## Reasons for decision

Judah (Joe) Zegman,

*complainant,*

*and*

Canadian Telephone Employees' Association,

*respondent,*

*and*

Bell Canada,

*employer.*

Board File: 745-5023

CLRB/CCRT Decision no. 1151

January 10, 1996

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Mr. Calvin B. Davis and Ms. Mary Rozenberg, Members.

### Appearances

Mr. Judah (Joe) Zegman, representing himself;

Mr. Larry Steinberg, assisted by Irene Jaworski, Vice-president, and Ms. Cindy Nettledon, Vice-president, for the Canadian Telephone Employees' Association; and Mr. André L. Paiement, assisted by Robyn M. McGregor, Associate Director, Industrial Relations, for Bell Canada.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

## I

The applicant, Mr. Judah Zegman, filed a complaint with the Canada Labour Relations Board alleging that the respondent Union had violated section 37 of the Canada Labour Code by failing to represent him with respect to a series of grievances. Section 37 provides:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

Following receipt of the labour relations officer's report, the Union provided the Board with a copy of a letter it had sent to Mr. Zegman confirming that he did not want the Union to proceed with his grievances. Mr. Zegman vehemently denied this allegation. To resolve this conflict in evidence, the Board held a hearing. This took place in Toronto on November 14, 1995.

## II

Mr. Zegman, employed by Bell Canada as a Direct Marketing Associate, had requested that his Union file three grievances on his behalf. One grievance contests Bell having denied him access to his employment file. The second grievance relates to his medical records. The third grievance refers to racial discrimination. Specifically, Mr. Zegman alleges that a pattern of events and comments over a period of two and a half years led him to conclude that racial discrimination negatively affected his career and also affected his personal, emotional, and mental well-being. As a settlement, he requests a written and oral apology from management.

The documentation on file and the section 37 complaint deal with the Union's treatment of the foregoing grievances. At the hearing, however, a very different story

emerged. The complainant told the Board that he suffered from an addiction to codeine and required help. According to Mr. Zegman, Bell had a policy whereby an addicted employee is provided with treatment at a facility located at Guelph or Kitchener, Ontario, and he wanted to be sent to such a centre for treatment. He claimed that the Union was aware of his addiction and, despite his requests for help, refused to provide him with any assistance. In his view, he had been treated differently from others who had similar problems and attributed this difference in treatment to racial discrimination.

### III

The evidence presented by Mr. Zegman centered around his addiction. In addition to his complaint regarding the lack of assistance with respect to his medical problem, Mr. Zegman complained that the Union had failed to provide him with the opportunity to present crucial medical evidence to management substantiating his addiction. He had requested 24 hours notice prior to a meeting at step four of the grievance procedure in order to bring his medical information with him. He was not given this notice and, as a result, he attended the meeting held on March 8, 1995 without being able to give the company the medical evidence he believed to be essential to his case. Mr. Zegman perceived this as discriminatory behaviour on the part of the Union.

On June 5, 1995, the complainant had a discussion with the Union's Vice-President, Cindy Nettledon, and with the Union's acting Chairperson of the Direct Marketing Unit, Boris Susac who advised him that management had denied his grievances. According to Mr. Zegman, the two officers said the grievances had no merit and asked him to sign a "waiver document". Mr. Zegman testified that he told them he would not sign any documents and wanted the Union to pursue his grievances. In his view, arbitration would provide him with the help he required.

In the interim, Mr. Zegman was required to leave Bell's premises due to his behaviour. Bell advised him by letter in May 1995 that he would not be accepted back

into the workforce until he provided the company with acceptable medical certification attesting that his behavioural problems could be controlled. He claimed that he tried to reach the Union for help on a number of occasions but was only contacted by a Union representative approximately one and a half weeks later. During the conversation he had with Cindy Nettledon, she advised him to remit the required medical documentation. Mr. Zegman told her that since he had done nothing wrong, he did not intend to submit a medical certificate.

On June 8, 1995, Bell again directed Mr. Zegman to provide the company with the medical certification it had requested and warned him that failure to comply would result in his dismissal. Mr. Zegman never provided the required certificate and was dismissed as of June 12, 1995. He did not file a grievance with respect to his termination. The reason he gave for not doing so was that he was in a state of shock.

#### IV

The Union, in its evidence, indicated it was aware of Mr. Zegman's medical condition and had made arrangements for Mr. Zegman to meet with and speak to a representative of management about his medical problem. Ms. Nettledon testified that at this meeting held on March 7, 1995 which she attended with the Union District Chairman, Jacqueline Francis, Mr. Zegman, and Jane Gill, a manager, the complainant not only discussed his concerns regarding what he considered as company discrimination against him but he also informed management of his addiction. While everyone was present, Ms. Gill called Bell Medical on Mr. Zegman's behalf and set up a meeting for an assessment.

Mr. Zegman told the Board that Bell Medical suggested he go to St. Michael's hospital for drug treatment, but the hospital did not have such a program. However, following Mr. Zegman's meeting at Bell Medical, he did not complain about the lack of treatment nor did he provide the Union officers with any further information.

As to the circumstances surrounding Mr. Zegman's complaint that he was given insufficient notice of the grievance procedure meeting with management, Mr. Susac testified that he was unable to advise Mr. Zegman beforehand. The complainant had been ill and was absent from work and Mr. Susac had been instructed by another Union officer not to call him at home given that his wife was not aware of his medical problem. As a result, Mr. Zegman only learned of the March 8th meeting that same day. According to both Ms. Nettledon and Mr. Susac, Mr. Zegman did not request that the meeting be postponed. He was given the opportunity to address his concerns at the meeting and did speak about having become addicted to drugs. Ms. Nettledon also mentioned that it was not a usual procedure for employees to be present at a step four grievance procedure meeting but because of Mr. Zegman's request to share certain information with Bell, the Union agreed to his presence.

Mr. Zegman's grievances were denied by management. Ms. Nettledon and Mr. Susac contacted Mr. Zegman on June 5, 1995 with respect to pursuing his grievances. According to the officers who took notes during the telephone conversation, Mr. Zegman wanted Bell to send him UIC forms and a severance package. Both officers emphatically stated that he instructed them not to proceed to arbitration. The Union confirmed this conversation by letter and was not aware that there was any dispute concerning its contents until receiving the complainant's letter of July 5, 1995 in which he claimed he had never provided such authorization to the Union.

The Union denied that Mr. Zegman's calls were not returned. Both Ms. Nettledon and Mr. Susac referred to other telephone conversations they had had with the complainant. Mr. Susac told the Board that following Mr. Zegman's removal from the workplace in May 1995, he called the complainant on his own time and provided him with answers to various questions raised by Mr. Zegman. On June 8, 1995, Ms. Nettledon called Mr. Zegman in response to his call to her on the previous day and discussed the medical documentation required by Bell. Ms. Nettledon advised him to provide the company with a doctor's letter so that he would be eligible for benefits.

Mr. Zegman responded by saying he was not willing to obtain the required medical documentation.

Ms. Nettledon called Mr. Zegman again on June 12, 1995. During this conversation the complainant told her that he had received a letter from Bell warning him that failure to provide medical documentation by June 9th would result in his dismissal. He advised her that he didn't want the Union to pursue his grievances nor did he wish to present a grievance with respect to his termination which became effective on June 12th; he had consulted a lawyer who had informed him that if he was released from the company, he could file a complaint with the Human Rights Commission.

## V

Two further points which were raised warrant comment. One concerns the effect of codeine. Mr. Zegman testified that this drug serves as a pain killer and, to a certain degree, it dulls the senses. In response to various questions concerning his June 5th discussion with Ms. Nettledon and Mr. Susac, the complainant stated that he did not have a clear recollection of this conversation. He also did not remember his response to correspondence from the company. As for his reaction to the Union's correspondence, Mr. Zegman stated that he was under mental stress and did not have the ability to respond.

Mr. Zegman stated that other employees who required medical assistance received help while he did not. The evidence indicated that although Bell has an employee assistance program, the collective agreement governing the parties contains no provisions concerning this program nor is there reference to the right to medical treatment in either the collective agreement or any letter of understanding.

## VI

Mr. Zegman claimed that the Union treated him differently than other members in similar circumstances which he submits amounts to discriminatory behaviour. In particular, he referred to the fact that other employees have been sent to a facility for their health problems. He maintained that the Union had failed to represent him by not assuring that he be provided with medical attention.

Counsel for the Union submitted that Mr. Zegman's complaint, as filed, alleges that the Union failed to represent him by not referring his grievances to arbitration. However, counsel maintained that the reason these grievances were not pursued was because the complainant had instructed the Union's officers not to proceed further. With respect to issues raised at the hearing, the Union argued that Mr. Zegman had not been treated differently from others. Had he provided a medical report, he would have still been employed by Bell. As for his medical problem, counsel claimed that the Union cannot send the complainant for treatment; this is a matter to be resolved between the complainant's doctor and Bell Medical.

The Board heard no evidence from Bell as to what assistance was offered to the complainant. This is due to the fact that an employer is not called upon to give evidence in section 37 complaints.

## VII

It is well established that a trade union is not required to take all grievances to a final disposition through arbitration. This discretion is however restricted by the imposition of certain standards of fair representation which were summarized by the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, where the Court stated:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

*1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

*2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

*3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

*4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

*5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527)

Consequently, the conduct of the Union, in its representation of Mr. Zegman, must be assessed in light of the foregoing principles. A violation of section 37 will be found only if the Union's conduct is found to be arbitrary, discriminatory, or in bad faith.

## VIII

The complainant has alleged a lack of representation on the part of the Union with respect to a number of grievances. On the basis of the evidence, the Board does not agree.

The grievances which had been filed on behalf of the complainant had proceeded through all four steps of the grievance procedure and Mr. Zegman had participated in the process. Following Bell's rejection of his grievances, Ms. Nettledon and Mr. Susac maintained that during a telephone conversation on June 5, 1995, Mr. Zegman stated that he did not wish to proceed with his grievances. Mr. Zegman denied that he had agreed to this course of action.

The Board does not consider the parties' conflicting positions to be a question of credibility but rather one of recall. The complainant does not remember the specifics of a number of conversations and events. In particular, he did not have a clear recollection of this June 5th conversation. In addition, he did not respond to the Union's letter confirming their conversation because he was incapable of doing so. Considering these circumstances, the Board concludes that Mr. Zegman did, in fact, instruct the Union not to proceed to arbitration. This being the case, the Board finds that the Union did not violate section 37 in not pursuing the foregoing grievances.

As for the alleged discriminatory behaviour by the Union with respect to the complainant's addiction, the existing employee assistance program does not form part of the collective agreement. In this respect, no finding can be made in virtue of section 37 of the Code given that the duty of fair representation applies only to those rights which come under the collective agreement (see Donald Publicover, February 21, 1994 (LD 1268)).

Assuming, without deciding, that the company's failure to provide the complainant with medical treatment could nevertheless be contested on the basis of the anti-discrimination provisions of the collective agreement, the complaint still cannot succeed. Mr. Zegman did not file a grievance contesting the non-provision of treatment and none of the grievances that had been filed concern this matter. There is no obligation on the part of a union pursuant to the Canada Labour Code to contest any position adopted by the employer; this responsibility rests with the employee

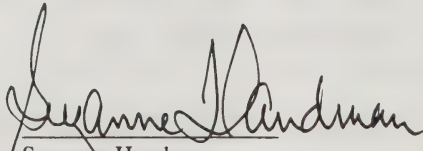
concerned (see Craig Harder (1984), 56 di 183; and 84 CLLC 16,043 (CLRB no. 472)).

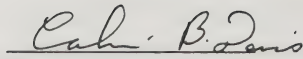
Furthermore, despite the absence of any grievance, the Union arranged for Mr. Zegman to meet management and present his problem. Mr. Zegman was referred to Bell Medical. Although the assessment did not result in treatment for the complainant, he failed to inform the officers of the Union that he was dissatisfied with the outcome.

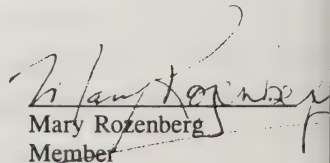
Finally, following his release from the company, he did not follow the Union's suggestion to submit the required medical certification when it became evident that he would be dismissed if he failed to provide the necessary medical documents (see Karol Horvath (1995), as yet unreported CLRB decision no. 1145). In addition, he did not contest his dismissal.

While the Board has full sympathy for Mr. Zegman's situation, there are no grounds, in virtue of section 37, to intervene. In view of the evidence, the Union's actions cannot be found to be contrary to section 37 of the Code.

Accordingly, the complaint is dismissed.

  
Suzanne Handman  
Vice-Chair

  
Calvin B. Davis  
Member

  
Mary Rozenberg  
Member

# information

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## Summary

International Association of Machinists and Aerospace Workers, Local 2413, complainant/applicant, and Execujet Aviation Services Ltd., respondent/employer.

Board Files: 745-4967; 560-323; 585-560

CLRB/CCRT Decision no. 1152  
May 14, 1996

The International Association of Machinists and Aerospace Workers, Local 2413 (IAM), filed applications with the Board under sections 35, 44 and 46 of the Canada Labour Code with respect to the union's bargaining rights as a result of a sale of business. It also filed an unfair labour practice complaint alleging that sections 8, 94 and 96 of the Code had been breached.

The Board was advised before commencement of the hearing that the purchaser, Execujet, had been in receivership. Price Waterhouse is the receiver and was given notice of the hearings.

At the hearing neither Execujet nor the receiver, Price Waterhouse, was in attendance. After a brief adjournment to determine whether or not they were going to attend, the Board received assurances from Price Waterhouse that they were aware of the hearing but would not be attending.

As per Board regulation 20(2), the Board proceeded with the hearing. It determined that

## Résumé

Association internationale des machinistes et des travailleurs de l'aérospatiale, section locale 2413, plaignante/requérante, et Execujet Aviation Services Ltd., intimée/employeur.

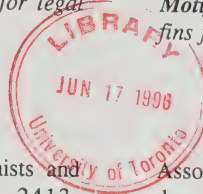
Dossiers du Conseil: 745-4967; 560-323; 585-560  
CLRB/CCRT Décision n° 1152  
le 14 mai 1996

L'Association internationale des machinistes et des travailleurs de l'aérospatiale, section locale 2413 (AIM), a présenté devant le Conseil des demandes fondées sur les articles 35, 44 et 46 du Code canadien du travail. Ces demandes portent sur les droits de négociation du syndicat à la suite d'une vente d'entreprise. Elle a également déposé une plainte de pratique déloyale de travail alléguant violation des articles 8, 94 et 96 du Code.

Avant le début de l'audience, on a informé le Conseil de la mise en tutelle de l'acheteur, Execujet. Un avis d'audience avait été transmis au curateur, Price Waterhouse.

Ni Execujet ni le curateur, Price Waterhouse, n'étaient présents à l'audience. Après un bref ajournement accordé dans le but d'établir si ceux-ci se présenteraient ou non, Price Waterhouse a informé le Conseil qu'il était au courant de la tenue de l'audience, mais qu'il ne comptait pas y assister.

Conformément au paragraphe 20(2) de ses règlements, le Conseil a continué l'audience.



a sale of business had occurred. Execujet had continued in the business Field was involved in. There had been a substantial continuity of all the elements of the predecessor's business, including a transfer of assets, employees, and goodwill. The purpose of the business is the same.

The Board also found that Execujet had committed an unfair labour practice when it did not hire five Field employees. The employees not hired had several years of experience with Field, and were union activists.

Due to the fact Execujet or its agent failed to appear at the hearing, the evidence of the union witnesses was not contradicted. The Board found that Execujet's decision not to hire the five employees concerned was motivated by anti-union animus.

Accordingly, it found that the employer had violated section 94 of the Code, and ordered appropriate remedies.

Il conclut qu'il y a eu vente d'entreprise. Execujet a continué l'entreprise antérieurement exploitée par Field. Il y a eu une continuité manifeste des tous les éléments de l'entreprise du prédécesseur, y compris un transfert des biens, des employés et de l'achalandage. L'objet de l'entreprise est demeuré le même.

Le Conseil conclut également qu'Execujet s'est rendu coupable de pratique déloyale de travail lorsqu'il n'a pas embauché cinq employés de Field. Les employés visés comptaient plusieurs années d'ancienneté dans l'entreprise et étaient des militants syndicaux.

Vu que Execujet ou son mandataire ne s'est pas présenté à l'audience, la preuve des témoins du syndicat n'a pas été contredite. Le Conseil conclut que la décision d'Execujet de ne pas embaucher les cinq employés en cause était empreinte d'antisyndicalisme.

Par conséquent, le Conseil conclut que l'employeur a enfreint l'article 94 du Code et il ordonne les mesures de redressement qui s'imposent.

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LES MOTIFS DE DÉCISION DU CCRT SONT  
MAINTENANT ACCESSIBLES DANS QUICKLAW.

## Reasons for decision

International Association of Machinists and  
Aerospace Workers, Local 2413,

*complainant/applicant,*

*and*

Execujet Aviation Services Ltd.,

*respondent/employer.*

Board Files: 745-4967  
560-323  
585-560

CLRB/CCRT Decision no. 1152  
May 14, 1996

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The Board was composed of Messrs. Jean L. Guilbeault, Q.C./c.r., Vice-Chair, and Calvin B. Davis and Patrick H. Shafer, Members. Hearings were held on June 8 and August 14 and 15, 1995 at Toronto.

### Appearances

Ms. Luiza Monteiro, assisted by Mr. Steve Vodi, Directing Business Representative, IAM Local 2413 (June 8), and Mr. Ron Cowl, Chief Steward, IAM Local 2413, for the complainant;

Mr. C.M. McKeown, assisted by Ms. Kristin Taylor, Co-counsel, Mr. Gary Ondrey, President, Execujet Aviation Services Ltd. (June 8), and Mr. Paul Tyrrell, Vice-President Finance, Field Aviation Company Inc., for the respondent.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

The International Association of Machinists and Aerospace Workers, Local 2413 (IAM), filed applications with the Board under sections 35, 44, 45 and 46 of the Canada Labour Code with respect to the union's bargaining rights as a result of a sale of business between Field Aviation Company Inc. (Field) and Execujet Aviation

Services Ltd. (Execujet). It also filed an unfair labour practice complaint alleging that Execujet had violated sections 8, 94, and 96 of the Canada Labour Code.

Shortly after the August 14, 1995 hearing, the Board sent the parties a letter setting out its decision.

*"The International Association of Machinists and Aerospace Workers, Local 2413 filed applications with the Board pursuant to Sections 35 and 44 of the Code concerning Field Aviation Company Inc., Field Aviation East Ltd., Hunting Airport Properties Inc., Navair Limited and Execujet Aviation Services Ltd.*

*As well the Union also filed an unfair labour practice complaint alleging Execujet Aviation Services Ltd. had violated Sections 8, 94 and 96 of the Canada Labour Code.*

*When the panel consisting of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair and Members Calvin B. Davis and Patrick H. Shafer convened its hearing in June, it was advised by representatives of Execujet that they were seeking an adjournment. The purpose of the adjournment was to seek legal counsel as their previous counsel had withdrawn from the case. The Board granted the adjournment and advised the parties the hearing would take place from August 14th to August 18th.*

*On July 24 the Board was advised by its Toronto offices that Execujet had been in receivership since July 5 or 6. Price Waterhouse is the receiver and was given notice of the August hearings as well as a copy of the file.*

*At the hearing on August 14, neither Execujet nor the receiver, Price Waterhouse was in attendance. After a brief adjournment to determine whether or not they were going to attend, the Board received assurances from Price Waterhouse that they were aware of the hearing, but would not be attending.*

*Board Regulation 20(2) says the following:*

*'20.(2) Where a person who is notified of a hearing does not appear, the Board may proceed and dispose of the matter in the absence of that person.'*

*The Board proceeded with the hearing. After hearing the evidence the Board has made the following determinations:*

***(1) Sale of Business***

*a) A sale of business has occurred pursuant to section 44 of the Code between Field Aviation Company Inc. and Execujet Aviation Services Ltd.;*

*b) The sale of business took effect on November 2, 1994;*

*c) Execujet Aviation Services Ltd. is bound by the IAM's collective agreement.*

***(2) Unfair Labour Practice***

*The Board finds that Execujet contravened Section 94 of the Code when it did not hire the five following employees [Ron Cowl, Doug Reynolds, Bob Noble, Karen English and Susan Zeldenrust];*

*(3) The Board orders that Execujet cease violating the Code;*

*(4) The Board orders the five employees be reinstated into employment with Execujet;*

*(5) The Board orders the five employees be compensated for the pay and benefits lost as a result of not being hired by Execujet.*

*The Board appoints Mr. Peter Suchanek of its Toronto office, or a person designated by him, to assist the parties in implementing these orders. The Board shall remain seized of these matters in order to deal with any problem that may arise in connection with the implementation of these orders and to issue a formal order should such be requested.*

*Full written reasons for decision by the Board shall follow in due course."*

Field, which operates a fixed base operation at Pearson International Airport, has two components:

(1) Space leasing: Aircraft storage, office and shop leasing of space in hangars 1, 2 and 3. These spaces are leased from Hunting Airport Properties Inc. (Hunting) and from Dore Investments Ltd. (Dore).

(2) Aircraft refuelling, restaurant and catering facilities, aircraft de-icing, aircraft fluid sales, aircraft cleaning and grooming, automobile and limousine rental services.

From the 1960s, Field was Imperial Oil's fuel dispensing dealer at Pearson. After Imperial Oil and Field ended their business relationship, Field went looking for other customers to replace Imperial Oil. It approached Shell, which had already signed a contract with Execujet. In the meantime, Field pursued its other business interests at Pearson.

Execujet was Shell's dealer but had no facilities or hardware to carry out its contract, while Field had the available infrastructure but no contract with an oil company. Execujet expressed its wish to acquire from Hunting, Dore and Field all their rights, title and interests in lands, buildings, chattels and assets situated at Pearson and used by Field with respect to aircraft fuelling, aircraft storage, office and shop spaces, leasing, restaurant and catering facilities, aircraft de-icing, aircraft fluid sales, aircraft cleaning and grooming, automobile and limousine rental, and related services.

Execujet and field signed a letter of interest on October 7, 1993. Article 8 of the letter of intent provided that until the transaction had been completed, Execujet would supply the fuel required by Field at Pearson to continue to carry on its business. On October 13, 1993, both parties signed a refuelling agreement to that effect. Amended on March 11, 1994, the agreement provided it would be in effect until the closing of a purchase agreement entered into by Field and Execujet or until either party terminated the agreement by a written notice of seven days.

On May 18, 1994, Execujet signed a sale agreement in respect of the leasehold interests at Pearson (hangars and aerocentre) as well as certain assets and inventories relating to refuelling and space-leasing operations.

(1) Execujet would acquire hangar 1 from Dore, and the lease from tenants would be signed to Execujet.

(2) Hunting would sell hangars 2 and 3 to Execujet.

(3) The building which housed the aerocentre along with the lease were transferred to Execujet. The aerocentre consists of office space, cafeteria and passenger handling area associated with the fixed base operation.

(4) Execujet acquired from Field assets, inventories and equipment, which consisted for the most part of machinery, equipment (cafeteria appliances, vehicles, office equipment), tooling, refuelling lubricants, de-icing fluids, etc.

(5) The agreement between Field and Execujet also provided that the parts of lands or buildings, which were leased or sublet to tenants by Field under an occupancy agreement, would be assigned to Execujet at the time of the closing of the transaction.

(6) In accordance with a non-competition agreement, Field would not operate any aircraft fuelling, storage, office and shop leasing, restaurant or catering facility or aircraft fluid sales at Pearson, for a period of five years.

The transaction closed on November 2, 1994. Delays were for the most part due to the necessary consent of the Ministry of Transport in the assignments of ground leases.

### Sale of Business

The Board concluded that a sale of business pursuant to section 44 of the Code had occurred between Field and Execujet.

Each application for a declaration of sale of business must be examined on its merits, according to the approach adopted by the Board in Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402); and by the Ontario Labour Relations Board in Metropolitan Parking Inc., [1979] OLRB Rep. Dec. 1193, where it stated:

*"31. In determining whether a 'business' has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor's business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business - albeit with a change in the nominal owner. The Board in Culverhouse Foods Inc., [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed) commented:*

*'In each case the decisive question is whether or not there is a continuation of the business... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logog or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligation to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or nonexistence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of*

*the business after the transfer is the same as it was [sic] before i.e., whether there has been a continuation of the business.'*

*The issue before the Board remains whether there has been a 'transfer of a business'; but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of all the other elements of the predecessor's business. If the elements formerly used by 'A' to carry on business are now in the hands of 'B', and used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer from 'A' to 'B' - albeit complex and indirect, and perhaps even by operation of the law."*

(page 1206)

There is no doubt that the business in which Field was involved has continued with Execujet. There has been a substantial continuity of all the other elements of the predecessor's business (see Metropolitan Parking Inc., supra), and there has been a transfer of assets, employees, and goodwill. Furthermore, the purpose of the business is the same.

As the Board found that a sale of business pursuant to section 44 of the Code has occurred, it is not necessary to deal with the section 35 application.

#### Unfair Labour Practice Complaint

Around September 22, 1994, Execujet placed an ad in the Globe & Mail for aircraft linecrew persons; customer service representatives/hostess; building/equipment maintenance personnel and cafeteria staff. It hired all former Field employees who applied for work, with the exception of the five who are subject of the complaint.

The employees not hired had several years of experience with Field, and were union activists.

Ron Cowl - 21 years of service; union supporter

Doug Reynolds - 25 years of service; held various union positions such as union steward

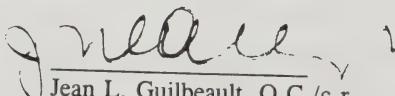
Bob Noble - 19 1/2 years of service; union supporter

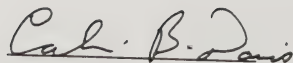
Karen English - 6 years of service; most senior person in her classification, and union shop steward for the customer service representatives for 1 1/2 years

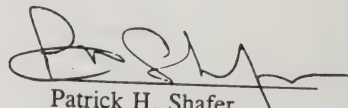
Susan Zeldenrust - 5 years of service

Ms. Zeldenrust informed the Board she had spoken on several occasions with Mr. Ondrey, the owner of Execujet, regarding the union. Mr. Ondrey told her that he could not afford to pay the wages provided in the collective agreement and that he would have to get rid of certain employees in order to oust the union. He wanted a leaner and meaner work-force so that employees could perform various tasks. Other witnesses had also spoken with management personnel of Execujet where it was made clear that Execujet did not want any union in the work place.

Due to the fact that Execujet or its agent failed to appear at the hearing, the evidence of the witnesses was not contradicted. Therefore, the Board found that Execujet's decision not to hire the five employees concerned was motivated by anti-union animus. Accordingly, it found that the employer had violated section 94 of the Code, and ordered appropriate remedies.

  
Jean L. Guilbeault, Q.C./c.r.  
Vice-Chair

  
Calvin B. Davis  
Member

  
Patrick H. Shafer  
Member

# information

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## Summary

MAR 25 1996

## Résumé

General Teamsters, Local Union No. 362, applicant, and Brink's Canada Limited, employer.

Section locale 362 du syndicat des Teamsters (General Teamsters), requérante, et Brink's Canada Limited, employeur.

Board File: 555-3952  
CLRB/CCRT Decision no. 1153  
February 27, 1996

Dossier du Conseil: 555-3952  
CLRB/CCRT Décision n° 1153  
le 27 février 1996

The applicant union filed an application for certification pursuant to section 24 of the Canada Labour Code seeking to be certified as the bargaining agent for a province-wide unit comprising employees in various classifications employed by Brink's in Alberta. However, the union was already certified to represent a group of employees working for Brink's in the city of Edmonton. By its application, the union sought in reality to add a large group of unrepresented employees to its existing unit.

Le syndicat requérant a présenté une demande d'accréditation en vertu de l'article 24 du Code canadien du travail en vue d'être accrédité à titre d'agent négociateur à l'échelle provinciale d'une unité d'employés de diverses classifications travaillant pour Brink's en Alberta. Toutefois, le syndicat était déjà accrédité pour représenter un groupe d'employés de Brink's dans la ville d'Edmonton. La demande présentée par le syndicat vise donc en réalité à ajouter un groupe important d'employés non représentés à l'unité existante.

The application while purporting to be a fresh application to represent an entirely new unit is in substance an application to amend the scope of the existing unit. Section 18 of the Code specifically governs this type of situation. In these circumstances, rather than dismiss the certification application, the Board treated it in the same manner as it would an application for review pursuant to section 18 of the Code.

La demande qui a été présentée comme une demande initiale pour représenter une toute nouvelle unité est au fond une demande de modification de la portée de l'unité existante. L'article 18 du Code régit précisément ce genre de situation. Dans les circonstances, le Conseil, plutôt que de rejeter la demande d'accréditation, l'a traitée de la même façon qu'il aurait traité une demande de révision présentée en vertu de l'article 18 du Code.

The Board reiterated its preference for larger, more comprehensive units. Although the Board will not generally alter an existing unit unless it is no longer appropriate, the Board will enlarge a unit when such a unit would be just as appropriate and would constitute a better basis for sound labour relations. In the present case, the Board found there was a sufficient community of interest to permit the enlargement of the Edmonton unit to include the unrepresented employees covered by the application and concluded that the proposed unit was appropriate.

The Board concluded that the union sought to add employees outside the intended scope of the original certification. Consequently, in determining the union's representative character, the Board, pursuant to the "double-majority" rule, required evidence not only of overall majority status of the applicant union but also evidence of majority support among the employees to be added. The Board was not satisfied that at the date the application was filed a majority of the employees to be added wished to have the union represent them. It therefore ordered a representation vote to be taken among the non-unionized employees the union seeks to represent.

Le Conseil a réitéré sa préférence pour des unités plus grandes, plus globales. Même si en général le Conseil ne modifie pas une unité existante à moins qu'elle ne soit plus habile à négocier, il agrandira une unité si cette dernière est également habile à négocier et qu'elle constitue un meilleur fondement pour de saines relations de travail. Dans la présente affaire, le Conseil détermine qu'il y a suffisamment d'intérêts communs pour justifier l'agrandissement de l'unité d'Edmonton de façon à y inclure les employés non représentés visés par la demande et conclut que l'unité proposée est habile à négocier.

Le Conseil conclut que le syndicat cherche à ajouter des employés non visés par la portée intentionnelle de l'accréditation initiale. En conséquence, la détermination du caractère représentatif du syndicat, compte tenu de la règle de la double majorité, repose sur la preuve que le syndicat requérant détient non seulement un appui majoritaire dans l'ensemble mais également un appui majoritaire auprès des employés qu'il veut faire ajouter. Le Conseil n'est pas convaincu qu'au moment de la présentation de la demande, la majorité des employés à ajouter désirait être représentée par le syndicat. Il ordonne donc la tenue d'un scrutin auprès des employés non syndiqués que le syndicat cherche à représenter.

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## Reasons for decision

General Teamsters, Local Union No. 362,

*applicant,*

*and*

Brink's Canada Limited,

*employer.*

Board File: 555-3952

CLRB/CCRT Decision no. 1153

February 27, 1996

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Ms. Sarah E. FitzGerald and Mr. David Gourdeau, Members.

### Appearances on Record

Mr. M.D. McGown, Q.C., for the General Teamsters, Local Union No. 362; and  
Mr. George Vassos, for Brink's Canada Limited.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

### **I - The Application**

This case concerns an application for certification filed pursuant to section 24 of the Canada Labour Code by the General Teamsters, Local Union No. 362 (the "Teamsters" or the "Union"). By virtue of this application, the Union has applied to be certified as the bargaining agent for a province-wide unit described as follows:

*"All employees of Brink's Canada Limited classified as assistant cashiers, messengers, drivers, guards, automatic teller technicians, money room clerks and mechanics, employed in the Province of Alberta."*

Brink's Canada Limited ("Brink's", the "company" or the "employer") is involved in the transportation of money and valuables across Canada as well as across international boundaries. It has regional offices located in Halifax, Hamilton, Toronto, Winnipeg, and Calgary. In the province of Alberta, the company has branches in Edmonton, Calgary, Red Deer, and Grand Prairie, as well as a satellite office in Fort McMurray.

The first application to represent employees of Brink's in Alberta was presented by the Amalgamated Transit Union, Local 583 (ATU). In November 1991 the ATU was certified to represent the following group of employees in Calgary:

*"all employees of Brink's Canada Limited working in and out of Calgary, Alberta, excluding cashiers, dispatchers, supervisors, those above the rank of supervisor, office and sales staff, and casual employees."*

This certification was amended in April 1992 by removing the term "casual employees". The employees of the Calgary office subsequently applied for decertification. Following a vote, the Board granted the application in October 1994, revoking the certification granted to the ATU for the unit of employees located in Calgary.

In the interim, in October 1992, the Teamsters applied to represent employees of Brink's employed in the city of Edmonton. In December 1992, the Board certified the Union to represent the following bargaining unit:

*"all employees of Brink's Canada Limited classified as assistant cashier, messenger, driver, guard, and automatic teller machine technician employed in the City of Edmonton, Alberta."*

Following a request by the Teamsters to vary the certification order, the Board granted the application in May 1993 and amended the bargaining unit description by adding the positions of money room clerks and mechanics to the bargaining unit.

Consequently, at the time the Teamsters filed the present application, there was one certification order in effect. This was the order granted to the Teamsters in 1993 to represent Brink's employees working in the city of Edmonton.

## **II - The Parties' Submissions**

### **The Employer:**

In response to the application, the employer submits that, although the Union has presented the application as one for certification under section 24 of the Code, the application is in reality an application for review pursuant to section 18 which seeks to bring about a major expansion to the existing Edmonton bargaining unit. Brink's requests that the application be deemed, or alternatively be treated as, an application under section 18. In support of its argument, Brink's invokes the existing certification of the Edmonton unit, the non-union status of the other branches and its satellite office, the fact that the unionized employees in Edmonton outnumber the non-unionized employees in the rest of the province, and the absence of any significant change in circumstances affecting labour relations between the parties.

Brink's further requests that the Board, on its own initiative, institute a section 18 review with respect to the bargaining unit configuration in Alberta of Brink's and its competitor Loomis, in order to ensure consistent treatment of both companies in the determination of bargaining units.

With respect to the appropriateness of the bargaining unit, Brink's argues that in a case such as the present one where the Union seeks to significantly expand an existing bargaining unit, it must show that the Edmonton unit is not appropriate for collective

bargaining and that there has been a significant change in labour relations circumstances which would warrant an expansion of the Edmonton unit. In its view, the Union has a practical evidential responsibility to demonstrate the lack of appropriateness of the Edmonton unit.

While acknowledging that the Board has a preference for larger bargaining units and broader based bargaining, Brink's submits that the Board must give consideration to the "public interest" and provide a "level playing field" for the main competitors in the armoured car industry. The company maintains that if the Board establishes a province-wide unit, it would be at a competitive disadvantage with respect to Loomis which has generally been organized and has bargained collectively on a branch by branch basis.

Brink's contests the appropriateness of a province-wide unit and submits that the appropriate bargaining unit structure consists of separate bargaining units for Alberta locations based upon majority support at each location. In support of this position, Brink's submits that it operates on a decentralized basis and that there is an absence of any significant community of interest between Alberta locations.

In the alternative, should the Board decide that it will grant a province-wide certification, Brink's would like the bargaining unit description modified to read:

*"all employees of Brink's... working at or out of any branches of the employer in Alberta"*

rather than:

*"all employees of Brink's... employed in the Province of Alberta".*

Finally, in the event that the Board considers the certification of an Alberta unit, Brink's submits that the "double-majority" rule as established in the case of Teleglobe

Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198) should be strictly applied.

**The Union:**

The Union is opposed to the Board dealing with any matter other than its certification application. It submits that its application is for certification and is not a review application. As such, the Code mandates the Board to ascertain the timeliness of the application, the appropriateness of the unit sought and whether, upon a review of membership cards, the applicant represents a majority of those in the unit. Once the Board is satisfied that these tests have been met, the applicant trade union must be certified. There is no discretion.

The Union maintains there is no justification for a Board initiated review of the bargaining unit configuration of both Brink's and Loomis in Alberta, as requested by Brink's. The same request was made by Brink's in Board File 530-2285 with respect to the bargaining unit structure of the two companies in British Columbia and was dismissed in Brink's Canada Limited (1994), 95 di 100 (CLRB no. 1084). The Union contests the argument presented by Brink's concerning the issue of a "level playing field". It submits that the employer has raised this argument before, unsuccessfully.

As for the issue concerning bargaining unit appropriateness, the Union maintains that the province-wide unit it is seeking has proven to be one which fosters industrial peace in Saskatchewan, British Columbia, Manitoba and New Brunswick. It also maintains that, by its application, it is increasing access to collective bargaining by continuing to represent the Edmonton employees and seeking to represent new and unrepresented employees.

The Union opposes the employer's suggested bargaining unit description which would read "all employees... working at or out of any branches..." According to the Union, if the Board granted a province-wide unit worded in this way, the employer could

arrange its affairs so that, despite having employees working in Alberta, it will have no branches in the province. The Union would like the unit described as all employees of Brink's "employed" in Alberta.

### **III - The Procedural Issue**

The Union has applied to be certified for a province-wide unit. However, unlike a first-time union applicant seeking to represent non-unionized employees, the Teamsters are presently certified as the bargaining agent for a group of employees in the city of Edmonton. By its application, the Union is seeking to add a group of unrepresented employees to its existing unit. In essence, the Union is seeking to modify its bargaining certificate in order to include employees who had been excluded from the intended scope of its certification. It has chosen to present a section 24 application for certification, not an application for review pursuant to section 18 which is the usual way of proceeding in such circumstances.

The question then arises as to the manner in which the Board will determine the appropriateness of the proposed bargaining unit and the representative character of the union, given the presence of an existing unit which forms a significant part of the unit sought.

The question is not without practical consequences. With respect to the representative character of a union, on an application for certification pursuant to section 24, paragraph 28(c) dictates that a simple majority in the bargaining unit is sufficient for certification. However, under section 18, where an already certified union applies to add employees who fall beyond the scope of its existing certification, the Board generally requires the union to demonstrate majority support among the employees to be added as well (see Teleglobe Canada, supra), hence the double-majority rule.

Similar situations have arisen in British Columbia. The British Columbia Labour Relations Board has rejected the notion that an application for certification which seeks to add employees to an existing unit constitutes a totally new certification. It views such applications as an attempt to circumvent the double-majority rule and treats the application as an application for review rather than as a fresh application for certification. The case of J. Lamberton Maritime Services Limited, no. C225/90, December 5, 1990 (IRC), provides an example of this position:

*"... Consequently, there is no doubt that any Guild application for the deckhands in those circumstances should properly have been made by way of variance [i.e. by review]. An application of the type filed by the Guild in this case, would have been without a doubt in the circumstances outlined above, an improper attempt to sweep the deckhands into its existing unit based on its already existing majority."*

(page 6)

The panel in J. Lamberton Maritime Services Limited, *supra*, relied upon the B.C. Board's reasoning in the case of Reliance Lumber Co. Ltd. et al., [1975] 1 Can LRBR 101. In the latter decision, the Teamsters which were already certified in a particular geographical location applied to be certified for a larger province-wide unit encompassing not only those employees already represented by virtue of its existing certification but also those employees who were excluded from the intended scope of the certification. The Board rejected the notion that the application was for a totally new certification for a totally new unit and considered it to be an application to vary the existing certification:

*"... it is obvious on its face that this is only technically a brand new certification. The Teamsters already represent and have an agreement for the largest group of employees who would be covered by the new certification. In substance, they are now seeking to enlarge that unit by sweeping in two other segments of the employees, the office and sales groups, although only a small number (considerably less than 35 per cent) of these employees have become members of the Teamsters. If we were to grant the*

*application, we would render meaningless the policy enunciated in Olivetti Canada Ltd. [i.e. the double-majority rule]. We are not prepared to do either of these."*

(page 103; emphasis added)

This Board views the present application in the same light. The application, while purporting to be a fresh application to represent an entirely new unit, is in substance an application to amend the scope of the existing unit. To that extent, the Board finds itself in a situation where it has to examine the appropriateness of the unit sought in a case where there already is an existing unit. Section 18 of the Code specifically governs this type of situation. In these circumstances, instead of dismissing the certification application, the Board has decided to treat it in the same manner as it would an application for review pursuant to section 18 of the Code. In the Board's view, to refuse to consider the application on the basis that it was filed pursuant to section 24 of the Code would be overly technical and would run contrary to sound labour relations, particularly since there is significant interest and support amongst the new employees the Union seeks to represent.

#### **IV - Appropriateness of the Bargaining Unit**

The Board must first consider the appropriateness of the proposed bargaining unit. The criteria applied by the Board in determining the configuration of bargaining units it deems appropriate are well established and we do not intend to provide a lengthy review of the Board's well known jurisprudence on this subject. Suffice it to say that the Board in general favours larger, more comprehensive units. This preference is due to a number of factors that include administrative efficiency and convenience in bargaining, enhancement of lateral mobility of employees, facilitation of a common framework of employment conditions and labour relations stability. (See Télébec Limitée (1995), as yet unreported CLR decision no. 1133; AirBC Limited (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797); and Canadian Pacific Limited (1992), 88 di 126 (CLRB no. 944).) The Board seeks to avoid the

proliferation of bargaining units and the fragmentation of personnel in an enterprise. Its preference for larger units is evidenced even where an employer operates at more than one location in the Board's jurisdiction. In sum, the Board considers larger units to be more conducive to orderly collective bargaining and stable labour relations (see Brink's Canada Limited (1084), supra, and George W. Adams, Canadian Labour Law, 2d ed. (Aurora, Ont.: Canada Law Book Inc., 1993), at chapter 7).

The Board will not generally alter an existing unit unless it is established that the existing bargaining structure is no longer appropriate for collective bargaining (see Canadian Broadcasting Corporation (1993), 92 di 95 (CLRB no. 1023); Canadian Broadcasting Corporation, February 18, 1993 (LD 1115); and Via Rail Canada Inc. (1992), 90 di 1 (CLRB no. 963)). However, this does not mean that the Board will not enlarge the bargaining unit when an enlarged unit would be just as appropriate and would be a better basis for sound labour relations (see Télébec Limitée, supra, page 18; and Telelobe Canada, supra, pages 334; and 141). This is particularly so in the case where non-unionized additions are made to a unit which is otherwise appropriate. The creation of a larger unit in such circumstances meets the broad objectives of the Code and the principles governing sound bargaining unit structures. It gives effect to the right to organize and at the same time takes into account the rights of those employees who are already represented.

The issues raised by Brink's with respect to the appropriate bargaining unit structure are largely the same as those submitted in a previous case. In particular, Brink's has argued for a bargaining unit structure organized on a branch-by-branch basis, alleging the absence of a community of interest between the province's locations as well as its competitive disadvantage with respect to Loomis. In Brink's Canada Limited (1084), supra, the Board considered the foregoing arguments and found them to be without merit. The Board sees no reason, on the basis of the facts presented by the parties, to conclude differently in the present case.

Indeed, Brink's provides the same services at each location and there are set policies and procedures for all branches (see Brink's Canada Limited (1992), 87 di 65; and 16 CLRBR (2d) 132 (CLBR no. 918)). The employees whom the applicant wishes to add to its unit perform the same functions as those already represented. The definition of the applicant's bargaining unit within the enterprise remains unchanged; it is merely enlarged in geographical scope. The employees clearly have similar employment interests. The Board also notes that a significant number of the non-unionized employees have expressed their wish to be represented by the Union. In these circumstances, we consider that there is a sufficient community of interest to permit the enlargement of the Edmonton unit to include those unrepresented employees sought by the application. For the above reasons we conclude that the proposed unit is appropriate.

## **V - The Representative Character**

There remains the question of the representative character of the Union in the expanded unit.

The Board, in cases of applications requesting that the scope of the unit be modified to include previously excluded employees, is particularly careful to ensure that the provisions of the Code are not circumvented and that new employees are not added to a unit without the union clearly seeking and obtaining their support. Consequently, the Board will not be satisfied with a simple overall majority within the extended unit. The incumbent will also be required to show majority support in the group of employees it seeks to add to the unit.

This requirement, frequently referred to as the "double-majority rule" is well established in Canadian labour law. This Board's leading case is Telelobe Canada, supra, where the Board's policy was set down as follows:

*"When the revised ordinance is substantially different from the original one, it would be more exact to state that it is...a modification or a transformation which so changes the nature and very essence of the original unit by way of enlargement or shrinking or otherwise, ...that it would no longer be the same unit as originally designed by the certified union and found appropriate by the Board.*

...

*In such circumstances, however, the applicant union shall have to prove that the majority of employees in the group which it wishes to add to its original unit, wish to be represented by it. Furthermore, it will have to prove that it represents an overall majority of the employees in the two groups. ..."*

(pages 310-311; and 119-120)

This policy strikes a delicate balance between the institutional interests of trade unions and the interests of the employees they wish to represent. Where a union seeks to add employees outside the intended scope of the original certification, it must demonstrate majority support. A union should not be allowed to use its existing membership strength in such a situation to increase the size of its bargaining unit without first having canvassed the wishes of the employees to be added. The policy thus respects the principles of freedom of association which underpin the Code by ensuring that employees are not "swept in" without having had the opportunity to express their wishes and without the union having garnered majority support among them. These principles are expressed by the Board in New Brunswick Broadcasting Co. Limited (1988), 75 di 101 (CLRB no. 711), upheld by the Federal Court of Appeal (National Association of Broadcast Employees and Technicians v. New Brunswick Broadcasting Co. Limited, judgment rendered from the bench, no. A-1138-88 (F.C.A.)):

*"... First and foremost, is the fundamental freedom given to employees in section 110 of the Code:*

*'110. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.'*

*This is the cornerstone of Part V of the Code upon which the certification processes in the Code are based. It is fundamental that a trade union becomes the bargaining agent for employees only through an expression of a wish on behalf of a majority of employees within the bounds of appropriate bargaining units. ...*

...

*... As such, these employees have a legitimate right under the Code to select a bargaining agent of their choice. In these circumstances, it is our respectful opinion that it would run counter to the fundamental principles of the Code to sweep the MITV Halifax employees into NABET's existing bargaining unit in New Brunswick on the strength of the wording of the 1982 certification order. ..."*

(pages 110-112)

The above-cited policy considerations are applied by labour relations boards in other jurisdictions as well. (For a review of the caselaw across Canada, see Sunnyland Poultry Products Ltd. (1993), 6 Labour Report 213 (Sask., no. 001-92).) In Olivetti Canada Ltd., [1975] 1 Can LRBR 60, for example, the same policy is clearly stated by the B.C. Board:

*"... the Board does not allow a union which has established itself in one location or among one group of employees to use that as a base for sweeping other employees into the unit through applications for variance. The union must also show that it has sought and obtained membership support in the new grouping and the Board follows its normal investigative procedures on certification applications to establish that fact. ..."*

(page 64)

In the present case, while the applicant has demonstrated an overall majority within the province-wide unit and substantial support in the added portion, the Board is not satisfied that, at the date the application was filed, a majority of the employees to be added wished to have the Union represent them as bargaining agent. The Board has

therefore decided to exercise its discretion and orders a representation vote to be taken among the non-unionized employees the Union seeks to represent.

The Board has determined that the employees eligible to vote are those employees within the classifications specified in the application who were employed by Brink's in all branch locations or offices in Alberta, other than Edmonton, on the date the present application was filed and who are still employed by Brink's on the date the vote is held.

## VI - Order

FOR THESE REASONS, the Board

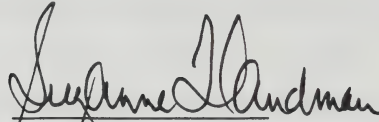
DECIDES that the following unit is appropriate for collective bargaining:

*"all employees of Brink's Canada Limited classified as assistant cashiers, messengers, drivers, guards, automatic teller technicians, money room clerks and mechanics, employed in the Province of Alberta."*

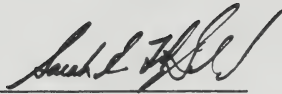
ORDERS a representation vote among those employees within the above classifications who were employed by Brink's on the date the present application was filed and who are still employed by Brink's on the date the vote is held, with the exception of those employees who are covered by the Teamsters' certification in Board File 530-2157.

The Board appoints Mr. John Taggart, a senior labour relations officer of the Board, to act as returning officer.

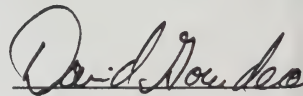
This is an interim decision within the meaning of section 20(1) of the Code.

A handwritten signature in cursive script, reading "Suzanne Handman".

Suzanne Handman  
Vice-Chair

A handwritten signature in cursive script, reading "Sarah E. FitzGerald".

Sarah E. FitzGerald  
Member

A handwritten signature in cursive script, reading "David Gourdeau".

David Gourdeau  
Member

# information

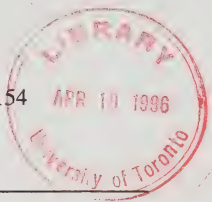
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## Summary

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), *complainant*, and Canadian National Railway Company, *respondent*.

Board File: 745-5008  
CLRB/CCRT Decision no. 1154  
March 22, 1996



## Résumé

Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada), *plaignant*, et Compagnie des chemins de fer nationaux du Canada, *intimée*.

Dossier du Conseil: 745-5008  
CLRB/CCRT Décision n° 1154  
le 22 mars 1996

The National Automobile, Transportation and General Workers Union of Canada (CAW-Canada) filed a complaint with the Board alleging that the Canadian National Railway Company (CN) violated section 94(1)(a) of the Code. The union maintains that the Code was violated when the employer directly solicited employees to volunteer for enhanced buy-out packages.

The employer says it must be able to manage its business and make rational business decisions. It could offer the enhanced buy-out packages to volunteers as the collective agreement contains no specific requirement regarding the manner in which the packages were to be allocated to individual employees.

The employer does have the right to allocate the buy-outs. However, in acting as it did, the employer effectively emasculated the union's ability to address, in a meaningful manner, the consequences of a business decision which would significantly affect the employment rights of union members. In so doing, it

Le Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada) a déposé une plainte auprès du Conseil alléguant que la Compagnie des chemins de fer nationaux du Canada avait enfreint l'alinéa 94(1)a) du Code. Le syndicat prétend qu'il y a eu infraction au Code lorsque l'employeur a incité directement les employés à se prévaloir d'un programme amélioré de primes de départ volontaire.

L'employeur dit qu'il doit pouvoir gérer son entreprise et prendre des décisions d'affaire rationnelles. Selon lui, il pouvait offrir le programme amélioré de primes de départ volontaire car la convention collective ne contient aucune exigence précise sur la façon dont les primes doivent être distribuées aux employés.

L'employeur a bien le droit de distribuer les primes. Cependant, par sa façon d'agir, il a de fait privé le syndicat de sa capacité de traiter, de façon significative, les conséquences d'une décision d'affaire qui aurait des répercussions considérables sur les droits en matière d'emploi des membres du

interfered with the union's role as the employees' exclusive representative, particularly as it relates to critical job interests such as redundancies and lay-offs.

The Board found that the employer contravened section 94(1)(a) of the Code and ordered the appropriate remedies.

syndicat. Ce faisant, il s'est ingéré dans le rôle du syndicat à titre de représentant exclusif des employés, particulièrement lorsqu'il s'agit d'intérêts cruciaux reliés au travail tels que des excédents de personnel mises à pied.

Le Conseil juge que l'employeur a enfreint l'alinéa 94(1)a) du Code et ordonne les redressements qui s'imposent.

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## Reasons for decision

National Automobile, Aerospace,  
Transportation and General Workers Union of  
Canada (CAW-Canada),

*complainant,*

*and*

Canadian National Railway Company,

*respondent.*

Board File: 745-5008  
CLRB/CCRT Decision no. 1154  
March 22, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and François Bastien, Members. A hearing was held on August 2 and 3, and October 24 and 25, 1995, at Winnipeg.

### Appearances

Mr. D. Olszewski, National Representative, assisted by Mrs. Karen Naylor, National Representative, for the complainant;

Mr. Donald N. Kruk, Counsel, assisted by Mr. Myron W. Becker, Manager, Human Resources Planning, Canadian National Railway Company, for the respondent.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) filed a complaint with the Board alleging that the Canadian National Railway Company (CN) violated section 94(1)(a) of the Code. In the complaint, the union alleges that the employer attempted to gain an advantage in various negotiations by negatively influencing its membership's attitude toward the union. It alleged that an employer representative approached its members directly to find out who was interested in securing an enhanced severance package. Most of these

employees would not be eligible under the terms the union was trying to negotiate with the employer.

## I

In early 1993, CN announced the downsizing of its work-force. It would use a substantial amount of money to provide an "enhanced" buy-out package to current CN employees. Some members of unions in the Prairie region, which held a collective agreement with CN, were offered a buy-out. However, the employees represented by the Canadian Brotherhood of Railway and General Workers (CBRT - now merged with CAW-Canada) were not given that opportunity. The employer took the position that these employees had no employment security, and thus did not offer them enhanced buy-outs.

CAW-Canada came under increasing pressure from its membership to secure enhanced buy-outs. The members saw other CN employees receive packages of up to \$75,000.00 while they received nothing. The union once again took the problem to management in February 1994. Some time later, management responded by declaring that no enhanced buy-outs were available.

CN informed the union that all janitorial positions in the CBRT bargaining unit were being abolished on November 18, 1994. The union filed a grievance regarding this matter. The grievance was resolved. It provided for 20 enhanced buy-outs pursuant to Article 7.9 of the Employment and Security Income Maintenance Agreement. Five of the buy-outs were allocated to former janitorial staff who were not considered qualified for other CN positions. As well, the agreement clarified the eligibility requirements for buy-outs. The main criteria for buy-outs were established as follows: an employee must have seniority; must have been adversely affected by an article 8 notice; and must be eligible for retirement. After the union signed the agreement, its

office was flooded with calls from employees wanting the enhanced buy-outs. The union therefore urged CN to provide further buy-outs for other employees in the bargaining unit.

In the last week of December 1994, Mr. Olszewski received a call from Mr. Becker, a labour relations officer with CN. Mr. Becker asked to meet him in Saskatoon on January 6, 1995 to discuss an arrangement for more enhanced buy-outs. The following week, Mr. Becker called again, advising Mr. Olszewski that CN was willing to provide 30 enhanced buy-outs. The details were to be worked out between the parties on January 6.

However, on January 5, Mr. Olszewski received a call from a local union chairperson in Melville, Saskatchewan, enquiring if there were more buy-outs. A local supervisor had asked the local chairperson to canvass the employees to find out who would agree to leave the company for up to \$75,000.00. This upset Mr. Olszewski as he believed no one in Melville would likely qualify for buy-outs. When he called the supervisor in Saskatoon to enquire about the canvassing, he was told it was being done in case the proposed buy-outs became a reality.

At the January 6 meeting, union and management attempted to work out an agreement on buy-outs. The agreement was not finalized as the employer objected to the contracting-out and seniority clauses proposed by the union.

Mr. Becker asked Mr. Olszewski at the meeting if he would agree to grant buy-outs to two bargaining unit employees, Messrs. Mr. Kreutzer and Timlick. Mr. Olszewski replied that he would not as this would be political suicide. Neither of these employees' jobs were being abolished. Furthermore, more senior employees who were

eligible for retirement could have their jobs abolished, and would not be granted the same buy-out.

Both Mr. Kreutzer and Mr. Timlick were upset when a buy-out was not forthcoming. They both got the impression from management that but for the union's objections, a buy-out was possible. Mr. Timlick called and said his supervisor told him he could have the buy-out but the union had prevented it. He was quite upset and threatened to take legal action.

Mr. Kreutzer told the Board he spoke to a supervisor around Christmas of 1994. The supervisor said a buy-out was available for him. Just after Christmas, the supervisor called Mr. Kreutzer about the details of the buy-out and told him the buy-out was subject to union approval. In the first part of January, the supervisor told Mr. Kreutzer that he would not get the buy-out as the union would not give its approval. Mr. Kreutzer was not particularly surprised as Mr. Olszewski, in a conversation, had told him of the union's position with respect to buy-outs.

On January 12, 1995, Mr. Becker informed Mr. Olszewski that the company was not prepared to follow the seniority order with respect to the agreement discussed on January 6, 1995. If the union was not prepared to give the company more control on who received buy-outs, there would be no agreement on the manner in which the buy-outs were to be allocated. Once more, Mr. Becker indicated he was prepared to give a buy-out to Messrs. Kreutzer and Timlick if the union agreed.

The manner in which bargaining unit employee Dave Wood obtained his buy-out was particularly upsetting to the union. Mr. Wood was a 30-year old janitor who had

worked for CN for 12 years. He was afflicted with diabetes, and would be legally blind within a couple of years.

When the union became aware of Mr. Wood's situation, it immediately attempted to assist him. Ms. Naylor, a staff representative, began dealing with Ms. Gaborieau, a human resources officer for CN. She asked that the employer create a position for Mr. Wood so that he would be able to work even after losing his eyesight.

On September 2, 1994, Ms. Naylor along with Mr. Wood and his wife met with Ms. Gaborieau who presented Mr. Wood with a disability pension and severance payment estimate pursuant to Article 13 of the Employment Security and Income Maintenance Agreement. Ms. Naylor protested. She was adamant that, pursuant to Article 15 of the collective agreement and Canadian Human Rights legislation, the employer had to find suitable employment for Mr. Wood.

Ms. Naylor felt she had obtained a commitment from Ms. Gaborieau that the company would find a position for Mr. Wood. However, on November 18, 1994, Ms. Gaborieau advised Ms. Naylor that there was no job available. Ms. Naylor then discovered that Mr. Wood had already accepted a buy-out package.

According to Ms. Gaborieau, she did try to find suitable employment for Mr. Wood. However, any decision regarding this matter was not hers to make but that of the district manager. She found out on November 14 that there was no position available for Mr. Wood. Shortly thereafter, Mr. Wood called Ms. Gaborieau, requesting a meeting. He arrived at the meeting with his wife and sister. Several questions were put to Ms. Gaborieau about buy-outs and pensions, including a question by Mr. Wood concerning the availability of a buy-out for him. She responded that if he had been

approached regarding a buy-out, it was available. Mr. Wood never enquired about employment possibilities. He decided to take the severance package and filled out the appropriate forms. He was given the opportunity to change his mind, but he chose not to do so.

## II

Section 94(1)(a) of the Code provides as follows:

*"94.(1) No employer or person acting on behalf of an employer shall*

*(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."*

A prime function of section 94(1)(a) of the Code is to protect the viability of the union and its role of exclusive bargaining agent as entrenched in section 36(1)(a). While an employer is entitled to discuss matters that concern the operation of the work place with employees, it is not entitled to bargain directly with them. This was discussed in detail in Canadian Broadcasting Corporation (1994), 96 di 122; 27 CLRBR (2d) 110; and 95 CLLC 220-028 (CLRB no. 1102).

*"Although an employer is entitled to discuss matters that concern the operation of the workplace with employees, it is not entitled to bargain directly with them.*

*The general principles governing direct employer's communications with its employees were elaborated at length in Sedpex Inc. (1988), 72 di 148 (CLRB no. 667):*

*'Generally speaking the following principles apply to employer communications:*

*- an employer may reply to what he perceives as propaganda, but he may not use promises of reward, intimidation, threats or other*

*means of coercion to interfere with, undermine or derogate the union;*

*- he may not threaten unpleasant consequences if something is done or not done by a union;*

...

*- he may not make inappropriate selling pitches to employees over the head of the union;*

*- the employer is in the clear if he does not provide misleading information calculated to damage, or having the effect of damaging, the bargaining agent in the eyes of the people in the unit.*

*In short, if an employer speaks the truth, and does so moderately and rationally, exercising appropriate recognition of the legitimacy and role of the bargaining agent, the communication will probably be judged to be within the realm of permissibility. Where the communication does not distort the truth or mislead, sets out a reasonably fair and accurate summary of the situation, **does not denigrate the union or have the purpose and effect of undermining its efforts to represent its people**, it can be considered to be outside the prohibition of section 184(1)(a).'*

*(pages 159-160; emphasis added)*

*The Ontario Labour Relations Board examined these rules in the context of the collective bargaining process:*

*'The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, **especially when these communications occur during the course of negotiations**. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's*

*exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.'*

*(A.N. Shaw Restoration Ltd., [1978] 2 Can LRBR 214 (Ont.), at page 219; emphasis added; see also AAF-Ltd. - AAF-Ltée, no. 318/85, November 8, 1985 (BCLRB); and Perimeter Transportation Limited, no. C190/90, October 4, 1990 (BCIRC))*

*In Plaza Fibreglas Manufacturing Ltd. (1990), 6 CLRBR (2d) 174, the Ontario Labour Relations Board held that an employer's attempt to negotiate directly with its employees contravened the duty to bargain in good faith and also constituted unlawful interference with the union's exclusive right to represent employees of the bargaining unit:*

*'The duty to bargain exclusively with the union continues after the lockout. Direct bargaining with the employees in the bargaining unit is one further element in the employer's bargaining in bad faith under s. 15 of the Act. Such direct bargaining is indicative of the employer's refusal to satisfy its obligation to recognize the Steelworkers as the exclusive bargaining agent of the employees. Bargaining outside the contours of the appropriate bargaining relationship militates against the parties being able to achieve a collective agreement in an atmosphere marked by good faith as required by the Act. While I do not conclude that the treatment of union members or supporters was different from the treatment of non-members or those opposed to the union (despite the apparent failure to hire two union supporters who applied for jobs at Citcor), the effect of the direct bargaining is to give the employees the impression that they cannot depend on the union and that the employer does not believe it needs to negotiate with the union to achieve its aims. As such, it also contravenes s. 64 of the Act.'*

*(pages 194-195; emphasis added; see also to the same effect Radio Shack, [1980] 1 Can LRBR 99 (Ont.))*

*(Note: Section 64 of the Ontario legislation is similar to section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations).)*

*As both sections 94(1)(a) and 50 of the Code are aimed, among other things, at protecting the viability of the union and its role of exclusive bargaining agent entrenched in section 36(1)(a) (Buyers Transport Limited (1988), 75 di 164 (CLRB no. 715), page 183; and Canada Post Corporation (1985), 63 di 136 (CLRB no. 544), page 154), an employer's direct communications with its employees, while collective bargaining is in progress, that undermines or discredits the union in the eyes of the employees effectively contravenes both sections of the Code."*

(pages 127-129; 115-117; and 143,269-143,270)

The employer says that it must be able to manage its workforce and make rational business decisions. It could offer the enhanced buy-out packages to volunteers as the collective agreement contains no specific requirement regarding the manner in which the packages were to be allocated to individual employees. While acknowledging the union's request that seniority be recognized as much as possible, the employer's main criterion has been to match a volunteer with a job that was being abolished. This would achieve immediate cost savings. Therefore, canvassing of employees was done in anticipation of offering further opportunities for the enhanced packages beyond those agreed to in the letter of October 26, 1994. It was intended to facilitate a match of volunteers for severance with jobs that were to be abolished. It was in no way intended to undermine the union's role of employee representative. CN's objective was to allocate the enhanced buy-outs fairly, in consultation with the union.

The employer was well aware that buy-outs presented a problem for the union. The union told the employer that it was not only under pressure from its membership to seek more buy-outs, but there was also a problem regarding the manner in which buy-outs were going to be allocated. The employer did resolve part of the problem when it agreed to provide 30 more enhanced buy-outs. However, before any discussions

took place on January 6 with the union, management was canvassing bargaining unit employees to find out who was interested in volunteering for a package. Discussions also took place between supervisors and employees after the January 6 meeting, and before the employer communicated its final position to the union on January 12.

There is no doubt that the employer did communicate directly with employees to solicit volunteers for buy-outs. It did so knowing full well the union's position on the matter and before discussing with the union the allocation of buy-outs. This action undermined the union's efforts to represent its members.

This is not to say that the employer, in the circumstances, did not have the right to allocate the buy-outs. It did. However, in acting as it did, the employer effectively emasculated the union's ability to address, in a meaningful manner, the consequences of a business decision which would significantly affect the employment rights of union members. In so doing, it interfered with the union's role as the employees' exclusive representative, particularly as it relates to critical job interests such as redundancies and layoffs. As indicated by the Board in Canadian National Railway Company (1994), 95 di 78; and 94 CLLC 16,061 (CLRB no. 1081):

*"... The unions were denied an opportunity and the ability to explore in a rational, ordered manner any number of questions concerning employee status and rights and their own right of representation, questions that inevitably arise from a decision of such dramatic consequences given CNRC's position on the matter. Consequently, the unions were further denied the ability to deal credibly and advisedly with affected bargaining unit employees. ...*

*...*

*... The Code encourages healthy, stable bargaining relationships. To achieve this end, a party's role should not be undermined to such an extent that it is left with no meaningful capacity to represent its constituents in employment matters of vital concern to them (Canada*

*Post Corporation* (1985), 63 di 136 (CLRB no. 544), at pages 162-163). "

(pages 84-85; and 14,505)

The protection afforded to a bargaining agent under 94(1)(a) is meant to ensure that the agent will be able to duly represent the interests of all the employees within the bargaining unit. If an employer's unilateral action, whether intended or not, of dealing directly with the employees has the effect of eroding or substantially weakening that capacity, this conduct will be deemed to be in violation of the Code.

The Board also finds that the employer interfered with the union in the manner it dealt with Dave Wood. The union made it clear to the employer it considered Mr. Wood a special case and was exploring the possibility of his remaining an employee.

When Ms. Gaborieau found out there was no job available for Mr. Wood, she ignored the union and dealt directly with Mr. Wood. Only after it was a done deal did she bother to advise Ms. Naylor that Mr. Wood was leaving CN. She must have known, at least by the union's action, that it was attempting to find another position for Mr. Wood. Her actions violated the Code.

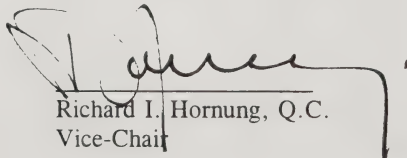
In the particular circumstances of this case, the employer by communicating directly with the employees acted contrary to the Code. This is not to say that under no circumstances should an employer representative be allowed to speak to bargaining unit employees. The employer has the right to discuss matters with its employees, but within certain limits. Canadian Broadcasting Corporation, *supra*, (CLRB no. 1102) outlines the general principles on the employer's role in communicating with

employees. Accordingly, the Board finds that the employer contravened section 94(1)(a) of the Code.

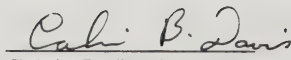
The union requested the Board order that Mr. Wood be reinstated and be allowed to keep the severance package. After serious considerations of the union's request, the Board decided not to order reinstatement. As we understand, Mr. Wood declined to appear before the Board when requested to do so by the union. As well, he did not wish to co-operate with the union. Although the union, and Ms. Naylor in particular, should be commended for their genuine concern for Mr. Wood, in light of Mr. Wood's lack of interest in reinstatement it would serve no useful labour relations purpose to do so.

The Board orders the following remedies:

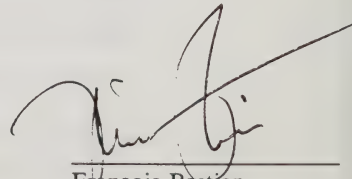
- (1) CN cease and desist from contravening section 94(1)(a) of the Code; and
- (2) within 30 days of receiving this decision, CN is to circulate the decision to each of its supervisors who work in the Prairie region.



Richard I. Hornung, Q.C.  
Vice-Chair



Calvin B. Davis  
Member



François Bastien  
Member

# information

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## Summary

Prince Rupert Grain Ltd., *applicant*;  
International Longshoremen's and  
Warehousemen's Union, Ship and Dock  
Foremen, Local 514; and Grain Workers  
Union, Local 333, CLC, *respondents*; and  
British Columbia Terminal Elevator  
Operators' Association, *employer*.

Board File: 560-324  
CLRB/CCRT Decision no. 1155  
March 1, 1996.



## Résumé

Prince Rupert Grain Ltd., *requérante*;  
Syndicat international des débardeurs et  
magasiniers, contremaîtres de navire et de  
quai, section locale 514; et Grain Workers  
Union, section locale 333, CTC, *intimés*; et  
British Columbia Terminal Elevator  
Operators' Association, *employeur*.

Dossier du Conseil: 560-324  
CLRB/CCRT Décision n° 1155  
le 1er mars 1996

Prince Rupert Grain Ltd. (PRG), consequent upon certification applications brought by the unions, filed an application pursuant to section 35 of the Code seeking a declaration that PRG and the British Columbia Terminal Elevator Operators' Association (BCTEOA) constitute a single employer for the purposes of Part I of the Code.

The Board initially examined the preliminary issue of whether an employer has standing to bring such an application. It determined that an employer may file a section 35 application in the circumstances of the present case. Where an employer's application filed under section 35 of the Code contravenes the objectives of the Code, it will exercise its discretion to dismiss that application.

On the merits of the case, the Board determined that all five prerequisites of section 35 had been met. PRG and the BCTEOA are two businesses under federal jurisdiction which are associated or related;

À la suite de demandes d'accréditation présentées par les syndicats, Prince Rupert Grain Ltd. (PRG) a présenté une demande fondée sur l'article 35 du Code en vue d'obtenir une déclaration selon laquelle PRG et la British Columbia Terminal Elevator Operators' Association (BCTEOA) constituent un employeur unique aux fins d'application de la Partie I du Code.

Le Conseil a d'abord examiné la question préliminaire du locus standi d'un employeur pour présenter une telle demande. Il a jugé qu'un employeur peut présenter une demande fondée sur l'article 35 dans les circonstances de la présente affaire. Si la demande présentée par un employeur en vertu de l'article 35 contrevient aux objectifs du Code, le Conseil exercera son pouvoir discrétionnaire et rejettera la demande.

En ce qui a trait au bien-fondé de l'affaire, le Conseil a jugé que les cinq conditions prévues à l'article 35 ont été remplies. PRG et la BCTEOA, deux entreprises qui relèvent de la compétence fédérale, sont associées ou

they are both employers within the meaning of the Code: PRG employs persons to operate its grain terminal and the BCTEOA has the status of "employer" with respect to all its members' employees for all purposes of the Code; finally, PRG and the BCTEOA are under common direction or control as their control is exercised by substantially the same group of grain companies.

Dealing with its discretion to make such a single employer declaration, the Board found that the rationalization of the bargaining structures is a valid labour relations reason to issue a section 35 declaration.

However, given the Federal Court of Appeal's ruling in Prince Rupert Grain Ltd. (1989), 101 N.R. 105, and the fact that the parties did not have an opportunity to address the question of the potential erosion of bargaining rights, the Board decided not to exercise its power under section 33 of the Code.

The application is dismissed.

connexes; elles sont toutes deux des employeurs au sens du Code; PRG emploie des personnes qui travaillent à son élévateur et la BCTEOA détient le statut d'«employeur» à l'égard des employés de ses membres aux fins du Code; enfin, PRG et la BCTEOA sont dirigées ou contrôlées essentiellement par le même groupe de sociétés céréalières.

Compte tenu de son pouvoir discrétionnaire de faire une déclaration d'employeur unique, le Conseil a jugé que la rationalisation des structures de négociation constitue un bon motif de relations de travail pour faire une déclaration aux termes de l'article 35.

Toutefois, en raison du jugement de la Cour d'appel fédérale dans Prince Rupert Grain Ltd. (1989), 101 N.R. 105, et le fait que les parties n'avaient pas eu l'occasion d'aborder la question de l'effritement possible des droits de négociation, le Conseil a décidé de ne pas exercer son pouvoir en vertu de l'article 33 du Code.

La demande est rejetée.

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## Reasons for decision

Prince Rupert Grain Ltd.,

*applicant,*

*and*

International Longshoremen's and  
Warehousemen's Union, Ship and Dock  
Foremen, Local 514; and Grain Services Union,  
Local 333, CLC,

*respondents;*

*and*

British Columbia Terminal Elevator Operators'  
Association,

*employer.*

Board File: 560-324  
CLRB/CCRT Decision no. 1155  
March 1, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairman, and  
Messrs. Calvin B. Davis and François Bastien, Members.

### Appearances

Mr. R. Alan Francis, for Prince Rupert Grain Ltd.;

Mr. Bruce A. Laughton, for the International Longshoremen's and Warehousemen's  
Union;

Mr. John A. Hodgins, for the Grain Services Union; and

Mr. Eric J. Harris, for the British Columbia Terminal Elevator Operators'  
Association.

The reasons for this decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chairman.

## I. NATURE OF APPLICATION

Prince Rupert Grain Ltd. ("PRG") brings this application, pursuant to section 35 of the Code, seeking a declaration that it and the British Columbia Terminal Elevator Operators' Association ("BCTEOA") are a single employer for all purposes of Part I of the Code.

The present application is related to, and was argued concurrently with, three applications for certification (Board files 555-3589, 555-3817 and 555-3820). Following the hearing, the Board certified the International Longshoremen's and Warehousemen's Union, Ship & Dock Foremen, Local 514 ("the ILWU"), on February 9, 1995, as the bargaining agent for the following unit:

*"all supervisory employees employed by Prince Rupert Grain Ltd. working at the Ridley Island Elevator in Prince Rupert known as: operations supervisor, maintenance supervisor, technical supervisor, excluding chief executive officer, terminal manager, manager of human resources, operations superintendent, maintenance superintendent, and plant systems superintendent."*

(Board file 555-3589)

In issuing the above order, the Board rejected the applicant's request that it defer its decision in that regard until it decided the present matter. In point of fact, the certification order was issued by the Board pursuant to the ruling of the Federal Court of Appeal in ILWU, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd. et al. (1994), 174 N.R. 255; and 94 CLLC 14,042 (leave to appeal to the S.C.C.

granted on March 30, 1995), which set aside the Board's original decision (Prince Rupert Grain Ltd. (1994), 93 di 164 (CLRB no. 1050)).

On September 15, 1995, the Board dismissed the two other competing applications for certification (555-3817 and 555-3820) filed by the Grain Workers Union, Local 333 ("GWU"), and the ILWU to represent the foremen employed by Saskatchewan Wheat Pool (Saskatchewan Wheat Pool (1995), as yet unreported CLRB decision no. 1141). A majority of the Board determined that the unions had not applied to be certified for the proper employer.

## **II. BACKGROUND**

The facts of this case are not in dispute. The applicant operates the grain terminal in Prince Rupert, British Columbia. PRG is itself owned by a number of grain companies. Four members of the BCTEOA hold PRG shares. Saskatchewan Wheat Pool and Alberta Wheat Pool are the two major shareholders with 31.5% and 26.2% of shares respectively. United Grain Growers and Pioneer Grain hold 16.8% and 9.3% respectively. The remaining shares are held by Manitoba Pool Elevators (5.5%), which is part owner of Pacific Elevators Limited, a member of the BCTEOA, and Cargill Limited (10.7%), which is not a member of the BCTEOA.

PRG's Board of Directors is appointed by the above shareholders. Saskatchewan Wheat Pool appoints two; Alberta Wheat Pool appoints two; Manitoba Pool Elevators and the remaining shareholders each appoint one. Finally, one director is appointed by the Government of Canada.

The BCTEOA is an employers' organization within the meaning of section 3 of the Code. It was formed to represent grain terminal employers in British Columbia. In 1977 the Board designated the BCTEOA, pursuant to section 33(1) of the Code, to be the employer for a unit of operational employees of the then five member companies

of the Association (Saskatchewan Wheat Pool et al. (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,104 (CLRb no. 83)).

In 1977, the BCTEOA's five member companies were the following:

Alberta Wheat Pool,  
Pioneer Grain Terminal Ltd.,  
Saskatchewan Wheat Pool,  
United Grain Growers Limited, and  
Pacific Elevators Limited.

PRG joined the BCTEOA in 1980 when it took over the grain terminal in Prince Rupert. Consequently, the BCTEOA's current membership now consists of PRG and the five above-named companies. However, although de facto a member of the association, PRG was never included in the 1977 certification order.

Although the BCTEOA does not exercise direction or control over employees of its members or carry out any of the functions relating to hiring, remunerating or discipline, the effect of the Board's designation in 1977 was to confer upon it the status of "employer" (within the meaning of section 3) with respect to all its members' employees for all purposes of the Code (Saskatchewan Wheat Pool (1141), supra).

The bargaining history between the two respondent unions, the BCTEOA and PRG was related by the Board in Prince Rupert Grain Ltd. (1050), supra, and warrants repeating here in order to provide an overall picture of the current labour relations situation:

*"Labour relations in the grain industry on the West Coast has been the focus of a number of Board decisions over the years. Without chronicling them in detail, a historical perspective on the key events of the recent past is essential for a proper understanding of the issues before us.*

*Between 1949 and 1972, the Board issued orders certifying Local 333 for separate groups of employees of the five terminal elevators in the port of Vancouver. In 1977, the Board rendered a decision which essentially dealt with three matters central to the present case: (1) it dismissed an application for certification by the Grain Handlers Union, Local 1, seeking to represent the employees of only the Saskatchewan Wheat Pool terminal for which Local 333 was already certified; (2) it granted an application for certification by Local 333 for a unit of all operational employees of the five terminal elevators in the port of Vancouver; and (3) at the same time, it designated the British Columbia Terminal Elevator Operators' Association (BCTEOA or the Association) as employer for the purposes of the certification granted to Local 333 (see Saskatchewan Wheat Pool et al. (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,014 (CLRB no. 83)).*

*In 1979, the Prince Rupert Grain terminal no.1 (commonly known as PRG 1) was privatized, and the attendant labour relations jurisdiction was transferred from the Public Service Staff Relations Board to this Board. This transfer resulted from a series of developments within the grain industry, the centrepiece of which was the decision to construct a second highly computerized terminal (PRG 2) in Prince Rupert under the aegis of a consortium of six grain elevator companies. The consortium took over operations of PRG 1 in 1980, thereby inheriting the employees of that terminal who were, until then, represented by the Public Service Alliance of Canada (PSAC).*

*Local 333 became, with the concurrence of the PSAC, the bargaining agent for those employees of the terminal who chose at the time to leave the public service and take jobs with the private employer. In 1980, that union was certified to represent employees of Prince Rupert Grain Terminal Consortium Limited, later changed to Prince Rupert Grain Terminals Limited (see Northern Sales Company Limited (1980), 40 di 128; [1980] 3 Can LRBR 15; and 80 CLLC 16,033 (CLRB no. 245)).*

*In 1983, the applicant, ILWU Local 514, applied to be certified, on a single employer basis, to represent the foremen at three terminals in the port of Vancouver. In its decision (files 555-1867, 555-1895, 555-1896, and 555-1909) the Board, after designating the BCTEOA as the employer, stated:*

*'The appropriate bargaining unit consists of "all foremen employed by the member companies of the B.C. Terminal Elevator Operators' Association".*

*For clarification, the member companies of the B.C. Terminal Elevator Operators' Association are: Saskatchewan Wheat Pool, Alberta Wheat Pool, Pioneer Grain Terminal Limited, Pacific Elevators Limited, United Grain Growers Limited, and Prince Rupert Grain Limited.'*  
(emphasis added)

*A vote was ordered. There was insufficient support within the unit described.*

*In 1986, the construction and operation of the new terminal (PRG 2) was the subject of an application to this Board under the technological change provisions of the Code. After dealing with the technological change aspect of the case, the Board extended the representational rights of Local 333 to PRG 2. When the new terminal became operational in early 1986, PRG 1 was closed (see Prince Rupert Grain Ltd. (1986), 67 di 104; and 86 CLLC 16,056 (CLRb no. 592)).*

*The West Coast terminal employers in the port of Vancouver have had co-ordinated collective bargaining since 1951, a situation which led to the formation by five companies in 1957 of the Association. The consequence was the negotiation by the Association of collective agreements exhibiting almost identical terms from one company to the other. As indicated, in 1977 the Association was designated by the Board as the employer for the purposes of the Code.*

*Prince Rupert Grain became a member of the Association in 1980 and as such was a party to the industry-wide agreements the Association negotiated for the calendar years 1980 through 1983. Although Prince Rupert Grain joined the Association in 1980, it was never designated by the Board as a member of that Association for the purposes of collective bargaining pursuant to section 33 of the Code.*

*This led to two subsequent applications in 1986 and 1987, in which the Association and Local 333 took diametrically opposite positions from those taken in the present case. These applications, and the positions taken by Local 333 and Prince Rupert Grain or the Association, have clouded the overall picture with respect to the Association's bargaining authority vis-à-vis Prince Rupert Grain.*

*Prince Rupert Grain and Local 333 went on separate bargaining tracks for the round of negotiation subsequent to 1983 insofar as they focused on issues arising from the construction and, later, the coming into operation of PRG 2 followed by the closure of PRG 1 referred to earlier. Although a memorandum of agreement providing for a renewed collective agreement between the Association and Local 333*

was signed in 1985, it did not settle the dispute regarding the ongoing negotiations with Prince Rupert Grain.

In 1986, Prince Rupert Grain sought a declaration from the Board that the collective agreement signed by the Association and Local 333 for the port of Vancouver was binding on that union and Prince Rupert Grain. Local 333 argued that it was; Prince Rupert Grain argued that it was not. The Board ruled that although a collective bargaining agreement had been concluded for the other member companies, none was concluded for Prince Rupert Grain insofar as section 131(2) (now section (33)) binds each employer member only:

‘...to the extent that the members were recognized by the Board as being members at the time of the original designation by the Board...’

*(Prince Rupert Grain Ltd. (592), supra, page 104)*

Ultimately, in 1988, Parliament legislated the grain workers back to work at Prince Rupert Grain. The Act applied only to Prince Rupert Grain, but imposed on the parties the collective agreement then in force at the other companies. The result was that Prince Rupert Grain was covered by essentially the same collective agreement that bound Local 333 and the other members of the Association.

The confusion was exacerbated by the position taken by Local 333 in challenging a Board order including Prince Rupert Grain in the Association. In *Grain Workers Union, Local 333 v. British Columbia Terminal Elevator Operators' Association and Prince Rupert Grain Ltd.* (1989), 101 N.R. 105 (F.C.A.), the Federal Court of Appeal quashed a Board order issued in *Prince Rupert Grain Ltd.* (1988), 75 di 13 (CLRB no. 706), which included Prince Rupert Grain terminal employees in the multi-employer bargaining unit certified in 1977. Having regard to the position taken by Prince Rupert Grain in the earlier case, it appears the union demonstrated to the Association that sauce for the goose was proverbial sauce for the gander. The Court concluded that, in amending its original designation order, the Board had exceeded its jurisdiction by short-circuiting the specific process provided for in the Code and used at the time the initial order was issued (*Grain Workers Union, Local 333 v. British Columbia Terminal Elevator Operators' Association et al., supra*). "

(pages 165-168)

Since the Board rendered its decision on February 9, 1995, the situation with respect to the foremen has changed. As mentioned above, those employed by PRG are currently represented by the ILWU pursuant to the certificate issued by the Board.

Also since that time, the BCTEOA was found to be the employer of all its members' employees for the purposes of Part I of the Code (Saskatchewan Wheat Pool (1141), supra). Accordingly, as mentioned previously, competing applications for certification filed by the GWU and the ILWU, to represent the foremen employed by Saskatchewan Wheat Pool, were dismissed by the Board on the grounds that the unions had not applied to be certified for a unit of employees of the proper employer, namely the BCTEOA, as designated by the Board in 1977.

### III. PARTIES' POSITIONS

The BCTEOA supports PRG's present section 35 application and adopts its submissions. PRG asks the Board to conclude that the BCTEOA and PRG are one employer for all purposes of Part I of the Code and that the appropriate bargaining unit for foremen includes all foremen of the BCTEOA and PRG. It argues that the single employer declaration is necessary to preserve the industry-wide bargaining structure and the consequent industrial stability that it provides.

Except for the Board's finding that the BCTEOA is the employer of all its 1977 members' employees, the parties essentially agreed that the five criteria required for a common employer declaration were met in this case.

What remains in dispute is whether there is an appropriate labour relations purpose for the Board to exercise its discretion to make the single employer declaration requested. The GWU argues that not only is there no labour relations purpose which supports it, but also that the application was filed in a transparent attempt to extend the scope of the Board's section 33 declaration to PRG employees without GWU's

consent. To do so would be contrary to the decision of the Federal Court of Appeal in Grain Workers Union, Local 333 v. British Columbia Terminal Elevator Operators' Association and Prince Rupert Grain Ltd. (1989), 101 N.R. 105.

The ILWU's position is similar. It argues that, in the circumstances of this case, rationalization of the bargaining structure cannot constitute "a labour relations purpose" insofar as there is no bargaining structure in place for the foremen at the present time (it must be remembered that at the time of the hearing in this matter, the Board had not issued its certification in file 555-3589). The union argues that the foremen must have access to collective bargaining through a certification order before rationalization of the bargaining structure can justify a single employer declaration. It submits that to grant a single employer declaration in the present circumstances would in fact prevent a bargaining structure from being established.

#### IV. PRELIMINARY ISSUE

At the hearing, the issue of whether an employer has standing to bring an application for a single employer declaration under section 35 of the Code was raised. The essential response of both unions was that regardless of the employer's right to bring the application, there was no proper labour relations purpose which an employer could invoke that could convince the Board to exercise its discretion.

Section 35 of the Code reads as follows:

*"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."*

(emphasis added)

The Board has addressed this issue in its jurisprudence on only two occasions. In a 1977 decision, the Board expressed the following opinion:

*"The union submits the timing of a request for a declaration under section 133 [now section 35] should not be considered by the Board. We disagree. Its timing is directly tied to the purpose for which the declaration is sought. It is certainly crucial to the invocation of section 133 for the primary purpose for which it was enacted. It is important if it is invoked by an employer on an application for certification to enlarge the scope of a bargaining unit or on an application for revocation by a union to defeat an application to revoke a certification order. In either case its use may be counter to other objectives of the Code. In this case, its use could have had no other effect than disturbing the stable, long term relationship at Calgary. The Board did not and does not consider that effect to be in furtherance of the objects of the Code, therefore it affirms the original decision not to exercise its discretion under section 133.*

*The union relies upon an argument in favour of allowing natural bargaining structures to emerge. This is a legitimate secondary use of section 133. However, its use for this purpose depends very much on the timing of the application and the circumstances in which it is to be used as well as the ancillary restructuring of bargaining units that accompanies a declaration. The Board's interference in pre-established or evolved structures, in a mature or novitiate relationship, is permitted in other circumstances under section 132 of the Code. In administering that section or acting under section 133 the Board ought to only act out of a public interest such as to minimize the incidence of bargaining or in an effort to create a climate for more harmonious labour relations. It ought not to act for the sole purpose of strengthening one party's hand and certainly ought not to do so in the midst of a climate of industrial conflict. To do so transforms section 133 from a remedial provision designed to protect rights under the Code into a medium for advancing the bargaining interests of one party contrary to the policy of the Code favouring free collective bargaining. In those circumstances, the Board should only interfere with bargaining structures if the foremost result will be a benefit to the public interest in more harmonious labour relations or serve other interests in the Code such as discouraging further breaches of the duty to bargain in good faith where an employer acts contrary to section 148."*

(Calgary Television Limited et al. (1977), 25 di 399; and [1978] 1 Can LRBR 532 (CLRB no. 118), pages 405-406; and 537; emphasis added)

More recently in *obiter*, the Board delineated two main arguments for refusing an employer standing to file an application for a single employer declaration, namely: (1) the wording of section 35 itself; and (2) the absence of a labour relations purpose.

*"First, let us not lose sight of the purpose of section 35. Time and again, the Board has said that section 35 is aimed at preventing a group of employers from evading or undermining existing bargaining rights.*

...

*Also, it has often been found that the purpose of section 35 is not to enable a union to enhance an existing bargaining relationship (see British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., *supra*), particularly in the midst of the renewal of a collective agreement. The same should also apply to the other side and we know that the Group filed its application at a time when it was about to renew three collective agreements. The existing jurisprudence affirms that the remedial purpose of section 35 is aimed at preventing the undermining of a bargaining agent's rights.*

...

*Section 35 is all about management structures making unionization useless and that is what a declaration by the Board has traditionally been said to be aimed at correcting.*

*Without having to decide the matter, we lean toward the view that employers cannot use section 35. That construction is strongly supported by the text of that provision while also being consistent with the jurisprudence regarding its purpose. When it adopted section 35, Parliament indicated that the Board could not issue an order pursuant to it without first 'affording to the employers a reasonable opportunity to make representations' (emphasis added). How is it that if unions were being considered as possible respondents, Parliament would not have provided for them the same right to be heard before the issuance of a Board order?" ...*

(Canada Transport Group Ltd. (1989), 78 di 174; 5 CLRBR (2d) 119; and 89 CLLC 16,044 (CLRB no. 759, pages 182-184; 127-128; and 14,426-14,427; emphasis added)

The British Columbia Labour Relations Board permits employers to file applications for a single employer declaration, in response to certification applications, if the employer can show that the unit sought is not appropriate:

*"In our view, an employer may successfully raise Section 37 of the Code [single employer provision] in response to an application for certification where a unit (or units) applied for would not be appropriate for collective bargaining and a combined unit would be appropriate. We wish to emphasize, however, that a common employer declaration may not be granted where a unit (or units) applied for would be appropriate for collective bargaining within the meaning of the Labour Code: see Madden Metals Ltd., (BCLRB No. 268/84). That is, in the same way that a trade union cannot rely on Section 37 to circumvent the normal certification provisions of the Code, an employer cannot rely on Section 37 to defeat an otherwise proper application for certification."*

(Kelowna Cabs (1981) Ltd., BCLRB No. 230/85, August 1, 1985, page 14; see also to the same effect Fort St. James Forest Products Ltd., BCLRB Letter Decision No. B172/94, April 29, 1994; and C.C. Industries Recreation Limited, BCLRB Letter Decision No. 279/95, July 18, 1995)

This Board's obiter comments in Canada Transport and Calgary Television, *supra*, on the interpretation of section 35, are an important and useful guide with respect to the objects and purposes of the Code in dealing with the merits of applications for a single employer declaration. However, in both above-mentioned cases, the Board was not required to deal directly with the issue of whether the employer was able to bring a section 35 application. Here the question that must be dealt with squarely by the Board - as a threshold determination - is whether an employer, consequent upon a certification application by a union, has standing to bring a concurrent single employer application to be subsequently considered on its merits.

The Board must be circumspect, in the interpretation of its enabling statute, before concluding that a party does not have standing to bring an application before it. This is all the more so in relation to section 35, where the Board's authority is discretionary.

Section 35, as worded, does not require that a union be the applicant. It does not even require that an application for a single employer declaration be filed, before the Board can actually exercise its discretion thereunder. The section merely requires that *"Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction..."*, the Board must give employers an opportunity to make representations before such an order is granted. In fact, the Federal Court of Appeal has ruled that the Board may, *proprio motu*, make such a declaration:

*"It should be pointed out that section 119 of the Code states that the Board may rehear any application and that section 32 of the Regulations lays down the application procedure. Section 33 of the Regulations also prescribes a procedure for an application made under section 133 of the Code. However, section 133 [now section 35] does not require that the Board consider an application, but stipulates that 'where, in the opinion of the Board ... the Board may...'. "*

*This Court must accordingly conclude that the Board may, on its own initiative, after giving the employers a reasonable opportunity to make representations, declare that these employers respectively constitute a single employer. As the proceedings of the Board are pursuant to the powers conferred on it by the Code, the privative clause contained in section 122(2) of the Code forbids any court to restrain such proceedings by prohibition."*

(Télévision Saint-François Inc. v. CLRB, [1977] 2 F.C. 294, page 299; emphasis added; see also to the same effect Aéro-Photo (1961) Inc. et al. (1992), 87 di 76 (CLRB no. 919))

The liberal interpretation suggested by the Federal Court of Appeal in Télévision Saint-François, supra, is consistent with the broad powers conferred upon the Board pursuant to section 16(p)(i), which provides:

*"16. The board has, in relation to any proceeding before it, power*

*...*

*(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether*

*(i) a person is an employer or an employee,"*

*...*

Accordingly, in context, the phrase "*after affording to the employers a reasonable opportunity to make representations*" may well be interpreted as a direction for the Board to consider the employer's submissions before exercising its discretion, *proprio motu*, under section 35 in the context of another application filed under the Code. The section presupposes that the Board, for example, in dealing with an application for certification by a union, may itself decide that more than one employer should be considered a single employer and included within the bargaining unit structure it deems appropriate (see Quebec Stevedoring Co. Ltd. and Logistec Stevedoring Inc. et al., Board order in file no. 551-63, January 25, 1996). It stands to reason that, in such cases, the employers involved - particularly the new one added to the application by virtue of a Board direction under section 35 - must be given an opportunity to be heard prior to the Board issuing an order. In that sense the phrase states a fundamental principle of natural justice.

Regardless of who brings the application, parties whose interests can be adversely affected - including the union - must be given a reasonable opportunity to be heard

before a Board order issues. However, the fact that a portion of the section underlines a fundamental principle of administrative law should not, in our view, operate so as to preclude another party from bringing an application. Nor should the omission of a coinciding phrase requiring the Board to "afford the union a reasonable opportunity to make representations" be regarded as conclusive that the section bars an application by the employer. On the contrary, where the Code intends to restrict a party from bringing an application, its language to that effect is explicit. For example, applications under sections 33 and 45 are specifically restricted to circumstances where the same are brought by the union.

The Board's sound interpretation with respect to the remedial purposes of section 35, as referred to in Canada Transport and Calgary Television, *supra*, will continue to be the basis upon which the merits of any application brought pursuant to that section will be determined. However, notwithstanding the compelling logic behind the remedial purposes of section 35, it should not operate so as to restrict employers' access to a single employer declaration unless expressly prohibited by the language of the section itself. In our view, to deny a party standing to have the Board consider an application on its merits would require clear language to that effect, a quality obviously not found in the present wording of section 35.

When, as is the case here, an interested party is not expressly precluded by legislation from bringing an application, a decision to deny it standing can amount to a refusal to exercise a public duty imposed by statute. In their treatise, René Dussault and Louis Borgeat point out that it is not a tribunal's prerogative to refuse to exercise its discretion by declining to examine the merits of a case falling within its jurisdiction:

*"(iv) Refusal to Exercise Jurisdiction*

*Other than for cases where it acts under dictation by a third party, there are two primary ways in which an inferior tribunal, administrative agency or public officer can illegally fail to exercise statutory jurisdiction, thus committing a jurisdictional error. It may*

*decline to decide a matter over which it has statutory jurisdiction or it may simply refuse to fulfil a public duty imposed by statute.*

*(a) Matter Within Statutory Jurisdiction*

*An inferior tribunal, administrative agency or public officer acts illegally if there is refusal or neglect to decide a matter that is squarely within the jurisdiction assigned by statute. Both the Quebec Court of Appeal and the Supreme Court of Canada held in Association unie des compagnons et apprentis de l'industrie de la plomberie et tuyauterie des États-Unis et du Canada v. Commission des relations de travail du Québec that the Labour Relations Board had no power to decline its jurisdiction to decide a petition to suspend negotiations leading to the renewal of a collective agreement. The Board had exclusive jurisdiction in the matter under section 33 of the Labour Code. Brossard J. for the Court of Appeal described the question at issue as follows:*

*It is no longer a question of knowing, not whether the Board handed down a ruling, because all evidence shows that it did, but whether, by an error in law, it declined to exercise its jurisdiction in refusing to decide the merits of the petition for suspension. (translation)*

*And he concluded:*

*I view the Board as having erred in the case at bar in declining its jurisdiction to hear and decide the merits of the petition for suspension filed by the applicants, and as a result, a writ of mandamus should issue. (translation)*

*(René Dussault and Louis Borgeat, Administrative Law: A Treatise, Second Edition, Volume 4, (Toronto: Carswell, 1990), pages 206-207)*

The general principle above applies in the present case. This is especially so having regard to the initial fact that, under section 35, the Board's authority is discretionary and can be exercised *proprio motu* without reference to a specific application. Secondly, the determination and rationalization of appropriate bargaining units to foster constructive collective bargaining practices, is not only "...squarely within the jurisdiction..." assigned to the Board by the Code, it is, in many ways, its very *raison d'être*. In that sense, to refuse to consider the merits of an employer's request on the

basis that it has no standing would be tantamount to the Board refusing to exercise its statutory duty while at the same time denying a party an opportunity to have its labour relations concerns addressed on the merits within the confines of clear adjudicative guidelines.

The issue of whether an employer has standing to bring an application under section 35 is also worth examining in comparison to applications made pursuant to section 18 of the Code for the rationalization of multi-unit bargaining structures. It is generally accepted that any changes required within a multi-unit bargaining structure, comprised of a single employer and one or more unions, are to be addressed under the Code *via* review applications brought pursuant to section 18. In the past, the Board has permitted employers to request "global reviews" of their existing bargaining structures, pursuant to section 18 of the Code.

When examining the broader labour relations purposes that must be addressed in dealing with applications filed by employers pursuant to section 35, the Board cannot overlook the liberal interpretation it has taken of section 18 of the Code. That section has been interpreted to allow a range of applications - whether brought by the parties or, as envisaged by section 35, *proprio motu* by the Board - from bargaining unit reviews to reconsideration applications (see for example Maritime Employers' Association (1987), 71 di 77 (CLRB no. 648); Telelobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (CLRB no. 198); Canadian Broadcasting Corporation (1982), 44 di 19; and 1 Can LRBR (NS) 129 (CLRB no. 383); and Claude Latrémouille v. CLRB et al., file nos. A-445-82, A-467-82 and A-725-82, January 22, 1985 (F.C.A.); and Murray Bay Marine Terminal Inc. (1981), 46 di 55 (CLRB no. 352)).

An employer should therefore be equally permitted to adduce evidence, where appropriate, to demonstrate that its ownership or administrative and corporate structures warrant a single employer declaration under section 35 of the Code for collective bargaining purposes. To do otherwise would deviate from the liberal

interpretation which the Board has adopted, under section 18, to facilitate broader based bargaining structures as appear to be warranted.

Finally, there would be no point in the Board having the discretion to make a declaration and, *proprio motu*, embark upon an enquiry pursuant to section 35, if the sole purpose of the section was that of preventing a group of employers from evading or undermining existing bargaining rights. Considering its powers, and the purposes of the Code, the Board's role in such applications must extend to fashioning, where apropos, bargaining structures that meet the labour relations purposes of the Code. That being the case, the employer should not be denied access to such a "structuring" provision, whether remedial in character or not, when in the final result the applicability of the section hinges entirely on the merits of each case and the exercise of the Board's discretion.

In light of the judgment of the Federal Court of Appeal in Télévision Saint-François, supra, it would be academic to technically exclude an employer application under section 35 in that, even if it did so, the Board would nevertheless, at that stage, have sufficient information before it to deal *proprio motu* with the single employer issue on its merits. Practically speaking, even if the employer were *per se* excluded from bringing the application, it cannot be estopped from raising it in response, as part of another application, as it has done here.

It must be emphasized that, whether a section 35 application is brought by the union or the employer, the Board will nevertheless continue to scrutinize it to ensure that it is not brought to enable a union to improperly extend the scope of existing bargaining rights or, in particular, to allow an employer to undermine a bargaining agent's rights.

Given its discretion, and its close scrutiny, the Board will dismiss any application that contravenes the objectives of the Code, as set forth in Canada Transport, supra. The optimum consideration for the Board, in determining a section 35 application on its

merits, will remain as set forth in that decision to ensure that: "*management structures (do not make) unionization useless .. (which).. is what a declaration by the Board has traditionally been said to be aimed at correcting.*" Practically speaking, it makes no difference whether the application is brought by the employer or the union. The Board's focus on the mischief that section 35 is designed to prevent, and the considerations it balances in the overall exercise of its discretion, will ensure that an application will not undermine, erode, or deny bargaining rights.

Hence, it is our view that interpreting the statute in a fashion that will permit the employer to bring an application for a declaration pursuant to section 35 in the present circumstances is not inconsistent with either the objects and purpose of the Code or the interpretation given in Calgary Television and Canada Transport, *supra*, regarding the purposes of section 35. As indicated in Aéro-Photo (1961) Inc. et al. (1992), 87 di 76 (CLRB no. 919):

*"... in the end a declaration under section 35 always results from the Board exercising its discretion under the Code. This discretion must be exercised so as to promote sound labour relations that further the objectives of the Code. The Board had the following to say on this subject in The Canadian Press et al., *supra*:*

*'In addition to the criteria discussed above, there must be an evident purpose, in terms of industrial relations, for the Board to join together companies it finds related and under common direction and control. A declaration under Section [35] is not merely an academic exercise. The interest of the employees concerned and sound labour management relations must warrant a Board finding in this area.'*"

(pages 80-81)

Section 35 must be interpreted in its entire context, bearing in mind both the Board's discretion to make such a declaration and the contemporary need for bargaining structures that foster industrial stability and administrative efficiency. As indicated in

The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60):

*"... The Board's discretion is exercised on the basis of ensuring the rights of employees to be represented by the trade union of their choice in a bargaining structure conducive to 'effective industrial relations' and 'sound labour-management relations'."*

(pages 47; 360; and 16,104)

In each instance where an application is brought pursuant to section 35 -and the requisite criteria are met - it becomes a question of whether the Board will decide to exercise its discretion for the labour relations purposes described in the jurisprudence referred to herein. The Board's ability to address the issue on its merits and exercise its broad discretion should not be fettered by a prohibition against one of the affected parties to bring the application. Section 35 should not be interpreted restrictively in terms of the origin of the application.

Accordingly, we are of the view that an employer may file a section 35 application in the circumstances of the present case. In cases where the Board finds that the employer's application was filed for ulterior motives, such as to prevent access to collective bargaining, or to defeat existing bargaining rights, it will exercise its discretion and dismiss the application.

## **V. THE MERITS**

Section 35 of the Code gives the Board discretion to declare that two or more employers constitute a single employer for the purposes of the Code if the following five criteria have been met:

- "1. *two or more enterprises, i.e., businesses,*
2. *under federal jurisdiction,*
3. *associated or related,*
4. *of which at least two, but not necessarily all, are employers (Emde Trucking Ltd., supra),*
5. *the said businesses being operated by employers having common direction or control over them."*

(Murray Hill Limousine Service Ltd. et al. (1988), 74 di 127 (CLRB no. 699), page 145)

Although the parties agree that above criteria were met, it is nevertheless incumbent on the Board, pursuant to section 35, to satisfy itself that is so.

### **Two or more enterprises; under federal jurisdiction**

The BCTEOA and PRG are two businesses within federal jurisdiction. Specifically, as an employers' organization - designated pursuant to section 33 of the Code - which represents employers engaged in the grain handling industry, the BCTEOA is a federal undertaking (British Columbia Maritime Employers Association (1981), 45 di 357 (CLRB no. 347), page 361).

### **Associated or related**

Are they associated or related? The Board examines the employers' interrelationship as follows:

*"In assessing whether they are related, the Board has traditionally considered, as was stated in **Canadian Press et al.**, supra, the degree of interrelationship of the operations of the two businesses, the similarity and integration of their operations and their common direction.*

*The question of interrelationship appears to be quite complex. On this matter, the Board noted:*

*'... The factors used in determining this interrelationship can and do overlap with those used in establishing common control and ownership. To be considered is the degree of interrelationship of the operations of the various enterprises. Do they provide similar services and product? Are they part of a vertically integrated process whereby one business carries out one function, for example, mining ore, and another business, in the organization, processes it? In determining whether the companies are associated or related, the Board would also look into what extent ownership or management of the enterprises are common.'*"

(Murray Hill Limousine Service Ltd., supra, page 132)

PRG operates a grain terminal in Prince Rupert. It is one of the constituent members of the BCTEOA. The BCTEOA, for its part, is responsible for negotiating the terms and conditions of employment for all its members' employees on the West Coast, including PRG. In that sense, they perform interrelated functions in the grain business and are "associated or related" as that expression is interpreted and applied by the Board (see Murray Hill Limousine Service Ltd., supra).

### **At least two employers**

With respect to the fourth criterion, both PRG and the BCTEOA are employers within the meaning of the Code. The former clearly employs persons to operate its grain terminal and the latter has the status of "employer" with respect to its members' employees, for all purposes of the Code, conferred upon it via the 1977 Board declaration pursuant to section 33 (Saskatchewan Wheat Pool (83) (1977), supra, as interpreted in Saskatchewan Wheat Pool (1141), supra).

### **Common direction or control**

The direction or control of both PRG and the BCTEOA are exercised by substantially the same group of grain companies. The BCTEOA is composed of the following six members: Saskatchewan Wheat Pool, Alberta Wheat Pool, Pioneer Grain Terminal Ltd., United Grain Growers Limited, Pacific Elevators Limited, and Prince Rupert Grain. The first four BCTEOA members hold more than 83% of PRG shares and the majority of PRG's Board of Directors (6/8) are appointed by them.

Substantially the same group of companies which formed and operate BCTEOA, formed and operate PRG. Effective control or direction of the business of both PRG and BCTEOA is therefore exercised by substantially the same group of shareholders or constituent member companies. One employer need not be under the control or direction of another for the Board to find that they are under common control or direction, the fact that they share one or the other suffices: (Air Canada et al. (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRB no. 771)). For the purposes of section 35, PRG and the BCTEOA are under common control or direction (see Murray Hill Limousine Service Ltd., supra).

### **Labour relations purpose**

The mere existence of federal enterprises under common control or direction, or the simple fulfilment of the five criteria enumerated in Murray Hill Limousine Service Ltd., supra, is not sufficient to warrant a single employer declaration under section 35. Once it is determined that the five criteria have been met, the Board must still decide whether it will exercise its discretion to make a single employer declaration. To do so, the Board must be satisfied that the five prerequisites are accompanied by a labour relations purpose (see Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501), pages 84; and 20).

As outlined earlier, the purpose of section 35 has traditionally been considered to be remedial; classically, to prevent erosion of bargaining rights or avoidance of obligations under the Code:

*"The purpose of section 35 has always guided the exercise of the Board's discretion in these matters. That purpose is aimed at preventing the undermining or evading of bargaining rights through corporate or business arrangements (see British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., supra; and Beam Transport (1980) Ltd. and Brentwood Transport Ltd. (1988), 74 di 46 (CLRB no. 689).*

*Section 35 is not aimed at enhancing existing bargaining rights (British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., supra). Its purpose is remedial in nature. It is designed to ensure that employers only distinct in appearance do not succeed in circumventing their obligations under the Code by resorting to corporate restructuring or other types of business arrangements.*

...

*Section 35 is not aimed at exempting a bargaining agent from having to organize an otherwise genuinely distinct group of employees. In some cases, the issuance of a declaration by the Board may have that effect, but that is not its purpose. When the Board addresses the issue of discretion, the question ceases to be whether common control exists; it becomes whether common control contributes to the erosion of bargaining rights."*

*(Air Canada et al., supra, pages 118-119; emphasis added; see also Radio Acadie Ltée et al. (1994), 94 di 128 (CLRB no. 1071), p. 143)*

However, the labour relations purpose which justifies a section 35 declaration should not be restricted solely to that of preventing an employer from using the corporate structure to erode or undermine existing bargaining rights. As indicated earlier, the promotion of harmonious and effective industrial relations is a sound labour relations reason for the Board to exercise its discretion thereunder; (Canadian Press et al., supra).

In the present case, the applicant argued that a single employer declaration would promote "effective industrial relations" and "sound labour-management relations" in that it would preserve the industry-wide bargaining structure already in place. The Board has long acknowledged that the rationalization of bargaining structures is a valid labour relations reason for the Board to exercise its discretion under section 35 of the Code so long as bargaining rights are not denied or eroded:

*"Where a collective bargaining relationship already exists between the corporate entities subject to a single employer declaration and a bargaining agent the declaration of such status will have little remedial effect unless there is a corresponding and immediate application of other code provisions to the problem prompting the request for such declaration. In this case the objective of using section 133 is as an aid to facilitate the establishment of a more rational bargaining structure between the parties. We believe this is a legitimate and sound labour relations purpose. ..."*

(British Columbia Telephone Company (1979), 38 di 205 (CLRB no. 225), page 211; emphasis added)

More recently in Radio Acadie Ltée, *supra*, it stated:

*"In these circumstances, the Board concludes that a valid labour relations objective would be served by making a declaration of single employer because it opens the way for a review of the existing bargaining structure under section 18 of the Code."*

(page 145)

The British Columbia Labour Relations Board shares this view:

*"The purpose of section 38 [single employer provision] is not only to protect existing bargaining rights but also to promote other labour relations purposes.*

...

*The use of a common employer declaration to rationalize the description of a bargaining unit for which certification is sought has long been recognized as a valid labour relations purpose."*

(P. Gamache & Sons Logging Ltd., BCLRB no. 287/94, July 25, 1994; pages 8 and 12)

The Board's foremost consideration, when dealing with section 35 applications, must remain that of ensuring that the employer does not use the section to deny or erode bargaining rights. However, where existing bargaining unit structures are in place, and bargaining rights will clearly survive regardless of the Board's determination, the labour relations purpose which justifies a section 35 declaration need not be remedial alone. Although the rationalization of bargaining structures may not be the primary aim of section 35, to the extent it relates directly to the structuring of the collective bargaining relationship, it cannot be said that it does not constitute a legitimate labour relations purpose.

The argument raised by the ILWU to convince the Board not to exercise its discretion under section 35 - i.e. that the right of access to collective bargaining should prevail over the rationalization of the bargaining structure - no longer applies in the present circumstances. Since February 9, 1995, as a result of the Board's order, supervisors working at PRG have been represented by the ILWU in a stand-alone bargaining unit. Equally, as a result of the Board's 1977 employer designation, supervisors at the port of Vancouver are employees of the BCTEOA for all purposes of the Code, and a bargaining structure already exists with respect to those employees (see Saskatchewan Wheat Pool (1141), supra). It is by reason of that designation that access to collective bargaining can only be achieved through certification of all foremen of the BCTEOA, not because a section 35 declaration would issue. A declaration made pursuant to section 35 would therefore not confer or deny access to bargaining rights. There is accordingly no issue at stake in the present case related to the acquisition of bargaining rights.

At the time of this decision, only a portion of the employees who would be included in the bargaining structure - which would ultimately result from the Board's declaration pursuant to section 35 - had acquired bargaining rights. Therefore, the only bargaining rights that could be at risk, as a result of a section 35 declaration, are those granted on February 9, 1995 to the ILWU for the foremen of PRG consequent upon the Federal Court of Appeal's directive in ILWU, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd. et al. (1994), supra. Although the matter of whether a certification order should issue in file 555-3589 was argued concurrently with the present application, no certification order was in place at the time. Therefore, none of the parties led evidence or otherwise addressed the issue regarding the current situation with respect to those employees and the possible consequences that a section 35 declaration would have on their bargaining rights as they now exist.

Although it might be argued that a section 35 declaration would have the potential effect of eroding or undermining the collective bargaining rights conferred on the ILWU to represent the foremen at Prince Rupert, we would not reach that conclusion without first providing the parties with an opportunity to present evidence and argument in order to address that issue.

In any event, in light of the Federal Court of Appeal's ruling in Grain Workers Union, Local 333 v. BCTEOA and Prince Rupert Grain Ltd. (1989), supra, we are precluded from issuing such an order on jurisdictional grounds. In that case, the Court held that PRG could not be included in the 1977 original certificate via a section 18 review application without the union's consent as required by section 33 of the Code.

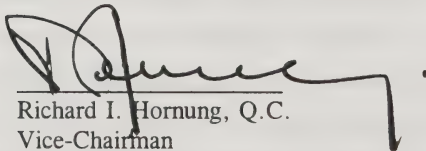
The Federal Court of Appeal has made it clear in two previous cases, dealing with the inclusion of PRG in the industry-wide bargaining unit, that the Board cannot disregard the specific provisions of section 33 of the Code either by using section 18 to add PRG as an employer covered by the 1977 original certificate (Grain Workers Union, Local 333 v. BCTEOA and Prince Rupert Grain Ltd. (1989), supra, or by

refusing to certify a bargaining agent for PRG supervisors on the basis that the unit sought was not appropriate (ILWU, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd. et al. (1994), supra). The same considerations apply in the present application with respect to section 35.

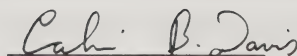
Unlike Saskatchewan Wheat Pool, PRG was not a member of the BCTEOA at the time of original certification and employer designation in 1977. It is therefore not covered by the bargaining certificate and cannot be included without the GWU's consent as required by section 33 of the Code (for a full analysis of the Board's reasoning in this regard, see Saskatchewan Wheat Pool (1141), supra).

Consequently, the application of section 35 to establish a bargaining structure which would join PRG and BCTEOA employees in these particular circumstances would effectually circumvent both the specific directives of the Federal Court of Appeal and, therefore, the requirements of section 33 of the Code with respect to the union's consent.

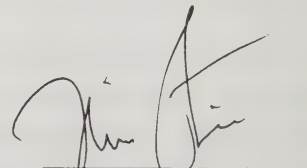
For these reasons, we are of the view that the Board should not exercise its discretion to issue a single employer declaration. The application is accordingly dismissed.



Richard I. Hornung, Q.C.  
Vice-Chairman



Calvin B. Davis  
Member



François Bastien  
Member

# information

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## Summary

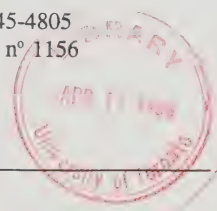
Rodney McLean, *complainant*, and International Longshoremen's and Warehousemen's Union, Local 502, *respondent*.

Board File: 745-4805  
CLRB/CCRT Decision no. 1156  
March 7, 1996

## Résumé

Rodney McLean, *plaignant*, et Syndicat international des débardeurs et magasiniers, section locale 502, *intimé*.

Dossier du Conseil: 745-4805  
CLRB/CCRT Décision n° 1156  
le 7 mars, 1996



This decision deals with a complaint filed by Rodney McLean pursuant to section 97 of the Canada Labour Code, alleging that the International Longshoremen's and Warehousemen's Union, Local 502 ("ILWU"), breached the provisions of section 69 by failing to establish and apply fair and non-discriminatory rules of referral.

La présente décision porte sur une plainte déposée par Rodney McLean en vertu de l'article 97 du Code canadien du travail, alléguant que le Syndicat international des débardeurs et magasiniers, section locale 502 (SIDM), a enfreint l'article 69 en ne réussissant pas à élaborer et mettre en application des règles de présentation justes et non discriminatoires.

The Board examined the process used by the ILWU for the purposes of establishing rules by which "casual" union members would move up and down the casual board and thereby be referred to employment. In light of a union's obligations pursuant to section 69, the Board examined the ad hoc rules applied by the union prior to October 3, 1991 and the "Board Moves Formula" promulgated by the union on that date. In addition, it considered the various resolutions passed by the ILWU relating, inter alia, to the "freezing" of the "D" and "E" boards and the file number system it established in 1988. The Board noted that, notwithstanding the provisions of sections 69(2) and 69(3), no formal referral policy was prepared, promulgated, put into

Le Conseil a examiné le processus utilisé par le SIDM dans l'élaboration de règles grâce auxquelles les membres «occasionnels» du syndicat pouvaient se déplacer sur les tableaux et ainsi obtenir du travail. Compte tenu des obligations qui incombent aux syndicats aux termes de l'article 69, le Conseil a examiné les règles spéciales appliquées par le syndicat avant le 3 octobre 1991 ainsi que la formule régissant les déplacements des occasionnels et promulguée par le syndicat à ce moment-là. Il a aussi examiné les diverses résolutions adoptées par le SIDM portant entre autres sur le «gel» des admissions aux tableaux «D» et «E» ainsi que le système de numérotation mis en place en 1988. Le Conseil a remarqué que, malgré les paragraphes 69(2) et 69(3), aucune

place or posted until 1994, following the present complaint.

According to the Board, the preferential treatment for relatives of union members instituted by the union in its referral process amounted to nepotism, which became entrenched as established union policy. Considering the manner in which the "file numbers" were assigned to casuals on the boards, this nepotism had a general effect on all casuals, including the complainant. Consequently, the union's policy of distinguishing between those individuals who were relatives of union members and those who were not, fell within the definition of discriminatory conduct contemplated by section 69 of the Code.

The Board rejected the ILWU's argument that the complaint was untimely. In the present case, the Board was concerned with a breach of section 69 in the establishment of the referral policy itself. Consequently, the union's breach, in the circumstances, is ongoing rather than event or employee specific.

In addition, and notwithstanding its determination that the nature of the union's breach was ongoing, the Board was satisfied that the complainant only learned of the circumstances giving rise to his complaint regarding the file number assigned to him on February 4, 1994 and lodged his complaint within 90 days thereafter.

With respect to the ordering of remedies, the Board, pursuant to section 20 of the Code, retains jurisdiction and directs that the hearing of this matter be reconvened in order to provide the parties with an opportunity to address the issue of fashioning a Board Order and appropriate remedies.

politique officielle régissant la présentation n'avait été élaborée, promulguée, mise en place ou affichée avant 1994, à la suite de la présente plainte.

Selon le Conseil, le traitement préférentiel accordé aux parents de membres du syndicat dans le cadre du processus de présentation équivaut à du népotisme, qui a été encaissé dans la politique syndicale. Compte tenu de la façon dont les numéros ont été attribués aux occasionnels, ce népotisme a influé sur tous les occasionnels, y compris le plaignant. Par conséquent, la politique en vertu de laquelle le syndicat fait une distinction entre les parents de membres du syndicat et les personnes qui ne sont pas apparentées relève de la définition de conduite discriminatoire qui figure à l'article 69 du Code.

Le Conseil rejette l'argument du SIDM que la plainte n'a pas été déposée dans les délais prescrits. Dans la présente affaire, il se préoccupe du fait que la politique elle-même régissant la présentation comporte une violation de l'article 69. Par conséquent, la violation par le syndicat est, dans les circonstances, continue et ne vise pas un événement ou un employé.

En outre, malgré la décision selon laquelle la nature de la violation par le syndicat est continue, le Conseil est convaincu que le plaignant n'a pris connaissance des circonstances donnant lieu à sa plainte concernant le numéro qui lui a été attribué que le 4 février 1994 et qu'il a déposé sa plainte dans les 90 jours suivant cette date.

En ce qui a trait aux redressements, le Conseil, aux termes de l'article 20 du Code, reste compétent et décrète qu'une autre audience sera convoquée pour donner aux parties la possibilité d'aborder la question de l'élaboration d'une ordonnance et des mesures de redressement qui s'imposent.

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## Reasons for decision

Rodney McLean,

*complainant,*

*and*

International Longshoremen's and  
Warehousemen's Union, Local 502,

*respondent.*

Board File: 745-4805

CLRB/CCRT Decision no. 1156

March 7, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairman, and Mr. Patrick H. Shafer, and Ms. Véronique L. Marleau, Members.

### Appearances

Mrs. Lee Anna McLean for the complainant; and

Mr. Bruce A. Laughton for the respondent.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chairman.

## **I**

On May 5, 1994, Rodney McLean filed a complaint with the Board, pursuant to section 97 of the Canada Labour Code, alleging that the respondent, the International Longshoremen's and Warehousemen's Union, Local 502, (hereafter "ILWU" or the "union"), breached the provisions of section 69 in that it had failed to establish and apply fair and non-discriminatory rules of referral.

The nature of Mr. McLean's complaint is perhaps best capsulized in the officer's report:

*"At the time of filing of his complaint the complainant disputed the actual file number which the respondent maintained had been assigned to him in 1988 i.e. #695. The complainant maintains he was given #686 in 1988. Following the provision by the respondent of documented evidence that the file number assigned to the complainant in 1988 was in fact #695 the focus of the complaint has shifted somewhat. The complainant now questions the assignment of file numbers 686 through 694 in 1988 to the persons to whom they were assigned. The complainant submits that based on the respondent's own criteria in effect at the time, i.e. 1988, that he should have been assigned file number 686.*

...

*During the course of investigation of this complaint the complainant was able to verify through the respondent's own records that the file number assigned to him in February of 1988 was indeed 695 and not 686 as claimed. Since the filing of this complaint with the Board it has however come to the complainant's attention that the assignment in 1988 of file numbers 686 through 694 may not have been in accordance with the respondent's own criteria which, as stated in its reply to this complaint, was an hours worked criteria. Moreover, the complainant questions how, in light of the fact the Boards were frozen from October of 1985 through February of 1988 and he being the first person placed on the Board after they were unfrozen, he could have been assigned a file number lower than those assigned numbers 686 through 694 inclusive. The complainant charges that persons assigned file numbers 686 through 694 were all relatives of union members and accordingly were improperly assigned file numbers ahead of him at a time the Boards were frozen and without regard to the respondent's own criteria governing Board placement. This now has become the new focus of the complainant's complaint."*

(pages 6-7)

Finally, during the hearing, the Board received a letter from Mr. McLean (Exhibit 23) in which he states:

"...

*I would like to take this opportunity to change the scope of the complaint that is now being heard by the Board to include unfair labour practices and discrimination which took place from 1984 to 1994. We base this request upon the fact that new evidence was introduced at the hearing in January which was previously unknown to me and supports my request for this change. I, believe at this time that my seniority should be based upon the assumption that my Dispatch Plate should not have been removed from "E" Board in 1985. In which case I would have remained on the Boards during the periods that they were "frozen" and would not have had new registrants placed in front of me."*

In our view, the above letter added nothing new to the original complaint, nor did it change the focus of the hearing or the Board's enquiry.

## II

In order to assess McLean's complaint, it is necessary to review the history of his involvement with the union as well as the process by which the union both established and administered its rules for the referral of its members to employment.

Rodney McLean is a casual longshoreman and a member of ILWU Local 502. He registered with the union in 1971 and, with the exception of certain prolonged periods of absence because of ill health or injury sustained on the job, he has remained employed in the industry since then.

The respondent is a New Westminster, B.C., trade union that represents employees involved in a variety of work, as set out in Article 2 of its Constitution and By-Laws, related mainly to longshoring. At the time the complaint was filed, ILWU Local 502 had approximately 310 members, including 150 casual members ("casuals") who are listed on the dispatch board at the hiring hall. The remaining members are permanent employees who work at Westshore Terminals and Fraser Surrey Docks.

The union employs the president, secretary-treasurer, and two business agents, as full-time paid employees. It has two standing committees, namely, the Grievance and Credentials Committee, and the Sick and Visiting Committee. As indicated in the officer's report:

*"The Grievance and Credentials Committee bears special comment as this Committee is charged not only with the responsibility of dealing with employees' (members' and casuals') grievances but also with hiring hall Board placements and movements. ...*

*The Grievance and Credentials Committee is comprised of the respondent's Vice-President, Secretary-Treasurer and 7 other members. Persons on this Committee are elected for a one year term. ...*

*This Committee may impose its own discipline on offending employees for rule violations, a procedure which is considered preferable to employer imposed discipline for certain infractions.*

*As its name suggests, this Committee also serves as a Credentials Committee. In this regard it is responsible for screening potential new union members when vacancies arise to ensure they are properly sponsored and medically fit. This Committee deals as well with hiring hall Board placements and movements to ensure that they are in compliance with established criteria.*

*Decisions of the Grievance and Credentials Committee are appealable to the general membership of the union. The respondent advises that in reality the number of appeals are few and of those appeals filed few are upheld."*

The only employees entitled to vote or with a voice at the union's general or committee meetings are full-fledged union members. In order to appear before either, a casual must be represented or "sponsored" by a member.

Through an agreement with the British Columbia Maritime Employers' Association (BCMEA), the union receives a monthly fee of \$14,608 (Exhibit 43) to dispatch its members to job sites for which the union is certified as the employee representative. In contrast, the dispatch system at the Vancouver ports is run by the BCMEA itself.

In his report the Board's officer described the union's current hiring hall practice as follows:

*"At present at the respondent's hiring hall there are six (6) casual Boards set up for purpose of dispatching casual longshoremen to available jobs. These six (6) casual Boards are in addition to the union membership Board. Union members enjoy first opportunity of dispatch over casuals who are dispatched in descending order of the Boards. The casual Boards and their constituent numbers at present are as follows:*

<i>A Board</i>	<i>-</i>	<i>40 casuals</i>
<i>B Board</i>	<i>-</i>	<i>25 casuals</i>
<i>C Board</i>	<i>-</i>	<i>25 casuals</i>
<i>D Board</i>	<i>-</i>	<i>35 casuals</i>
<i>E Board</i>	<i>-</i>	<i>35 casuals</i>
<i>F Board</i>	<i>-</i>	<i>35 casuals</i>
<i>G Board</i>	<i>-</i>	<i>15 casuals</i>
<i>Surplus Board</i>	<i>-</i>	<i>150 casuals</i>

*Casuals do not receive a plate and with it a corresponding file or seniority number until they achieve G Board status. From that point forward, providing they are able to maintain average hours as defined in the Dispatch Rules (for casuals) casual longshoremen move up their respective Boards and from a lower Board to a higher Board as vacancies occur. Under the present dispatch rules, Board movements occur every three months to the extent vacancies exist."*

*"(pages 3-4)*

The movement of union members up the various boards from "G" to "A" is crucial to a casual's job security and his aspirations to become a union member. The sooner a member moves through the boards to the top of the "A" board, the sooner he will be able to join the union and have his full-time employment secured. It is therefore important to ensure that the method by which people get onto the casual boards and the process by which they move up are accomplished fairly and without discrimination.

On October 3, 1991, the union promulgated a "Board Moves Formula" for the purposes of setting out the process by which members would move up and down the casual boards. The "formula" reads as follows (Exhibit 18):

*"BOARD MOVES FORMULA*

*OCTOBER 3, 1991*

1. *Pick the months for calculating each man's hours (Ex. May to August)*
2. *Delete men with high hours due to ratings (first aid, lift truck, topside mechanic welding electrician) and add all remaining men's hours for board total. Count the number of men left and divide into the total hours of the working men. Reduce that figure to 75% and give it to the men who have the high hours (deleted) and redo the average for all the men on the board.*
3. *Starting on A board, checking to see if all men have average hours and if they don't, go to each man's file and see if he has a reason for not meeting the average. (Medical, trade school, apprenticeship, F/aid school, WCB, recovering from surgery, or injury outside industry, such as sports or ICBC claim or car accident.) If the man has a reason, he gets average hours. If no reason is found, he is moved down to the top of the B board.*
4. *By making a move down, you have now created a vacancy on the upper board to be filled by plates off the next lower board, in order of seniority and meeting average hours. Be careful to check that you do not miss someone who has already come down since the last move.*

5. *Fill the A board from the highest seniority man off the B board, and continue this format down all the boards.*
6. *All plates should be placed on the boards by file number (seniority). Any man moved up must be placed under the next senior man, to keep the order clear.*
7. *There should be places at the tops of each board to allow for plates moved down, or up, as the case may be.*
8. *In some cases, the board may have to be split to allow for a man moving back up to enter his rightful spot."*

Wilfred Belanger, the secretary-treasurer of Local 502 from 1984 to 1994, testified that prior to October 3, 1991, and - notwithstanding the terms outlined in Exhibit 18 - thereafter, while he was secretary-treasurer, the movement of casuals from board to board was essentially done on an ad hoc basis which, we believe, can be fairly categorized as being at the caprice of the Grievance and Credentials Committee or the general union membership. Belanger admitted that notwithstanding the provisions of sections 69(2) and 69(3), no formal referral policy was prepared, promulgated, put into place or posted until 1994: i.e., following McLean's complaint. Those rules provide as follows (Exhibit 16):

- "1. Registration of new casuals will be done at the discretion of the dispatcher when there are jobs available. (i.e. not enough registered casuals available).*
- 2. After being registered, casuals will make themselves available for work - by placing a card with their name and registration number on it, in the receptacle provided by the Union, from which the dispatcher will draw out in lottery fashion, enough cards to fill jobs available at the dispatch. (cards must be submitted prior to the commencement of dispatch).*
- 3. New Westminster registered casuals will be given, upon request, a plate on the "SURPLUS BOARD". The office staff will only consider requests on the first week of each month.*

4. *Surplus Board Casuals will be dispatched according to a rotating pin, the pin moving past the last work job dispatched.*
5. *Board Status is achieved when in May and December the local posts a notice for two weeks that they are accepting board applications to fill openings on the "G" board, if any openings exist, applications will be open to New Westminster Registered Casuals, who have attained at least one year of service in prior year. In January and June the Union will review the application forms and fill the slots on the G-Board, allotting file numbers according to:*
  - A - *most consecutive years of service*
  - B - *earliest registration date in cases with same number of years of service*
- *A year of service was defined as being 63 hours, in February of 1985.*
6. *The Casual Boards will be structured to accommodate the following number of casuals.*

BOARD	CASUALS
A	40
B	25
C	25
D	35
E	35
F	35
G	35
SURPLUS BOARD	--

7. *Board moves for casuals will be performed every four months in January, May and September, based on the previous months end hours (end of December, April and August).*
8. *Casuals must maintain 75% of the average hours of the Board they are on to move up a board or stay on their board. If they have less than 75% of their board average they will be moved down a board.*

9. *Casuals that have Maintenance Ratings, First Aid Ratings, Top Side, L.T.D., Boat, Checker, Medical, Trade School Apprenticeship, WCB, Injury, also Westnauv Employees with proof of time served - will not be included in the averaging of their boards. Instead they will be given 75% of the average of all the other casuals on their board. The board averaging will then be redone counting the casuals that were previously deleted. The 75% figure will then be calculated from this average. In cases where required averaging of rating people will be done in conjunction with non rating people.*
10. *Casuals that have or will be absent from work for the following reasons - Medical, Trade School, First Aid School, WCB or other injury - must submit written proof along with the estimated length of their absence to the Union Secretary within thirty days of commencing their absence.*
11. *The casuals with the lowest file numbers will move up to fill any vacancies on the next higher board, providing they have met with the criteria in rules eight, nine and ten.*
12. *Casuals on the G-Board who have held Board Status for at least one calendar year (January to December) and at the end of that year they have less than 75% of average hours for the G-Board, they will lose their Board Status and forfeit their file number. These casuals may continue to work and may regain board status by following the standards set in rules two, three, four and five, they will, however, be given a new file number at this point.*
13. *Casuals will be charged dispatch fees accordingly:*

BOARD	AMOUNT PAID
A	Monthly - Existing
B	Monthly - Existing
C	Monthly - Existing
D	Monthly - Existing
E	Monthly - \$6.00
F	Monthly - \$5.00
G	Monthly - \$4.00

14. *Monthly fees are to be paid by the 21st day of each month or a fine for late payment will be charged.*

15. *Casuals three months in arrears on payment of fees and fines will have plate pulled and be notified to appear before the Grievance and Credentials Committee for discipline. Failure to appear without just cause could result in loss of Board Status and file number.*
16. *Casuals must make themselves available for work by turning their plate prior to dispatch.*
17. *Casuals are not allowed on the dispatch platform during dispatch unless they are called upon by the dispatcher.*
18. *The dispatcher has the right to refuse to dispatch a casual for being rude, obnoxious, disrespectful or if he suspects substance abuse (drugs or alcohol). The dispatcher may also report the casual to the Grievance Committee for discipline."*

### III

Although the union established the above dispatch rules in 1994 (Exhibit 16), at the time that McLean began work, and while his board status was evolving, a different process was at work with respect to the placement of members on the boards and their consequent work referrals. Belanger indicated that, prior to 1988, the process for placing casuals on the board - and the movement up the board to union membership - while he was secretary-treasurer, worked as follows.

1. When individuals first showed up at the union hall, they would fill out an application, give their social insurance number, and complete a registration form. Belanger would then assign a registration number to each of the applicants.

2. The person would thereafter work "out of the bucket" for a time. This was accomplished by showing up at the union hall over a period of time, on a regular basis, to wait for the opportunity to work when there were insufficient union members or casual employees on the existing board lists to fill the job requirements.
3. Eventually, through this process, the dispatcher would get to know the employee and arbitrarily provide him with a "plate" which would then be placed on the bottom board. (It should be noted here that both Belanger and the union's current president, Brian Ringrose, admitted that relatives of union members did not ordinarily spend time "in the bucket" but in fact were given a position on the casual boards when they completed the registration forms.)
4. When a casual employee was given a plate, the number on the plate would, relatively speaking, correspond to that person's registration number. This then would reflect his seniority number and, provided that the minimum hourly requirements promulgated by the union were achieved, the employee would thereafter maintain his "seniority" position on the boards.
5. Individuals who did not maintain their minimum hours or were otherwise removed from a board, by resolution of the general membership, came off that board.
6. Movement up to the "A" board and then into union membership depended on resolutions of the general membership, on the recommendation of the Grievance and Credentials Committee, and was generally governed by the provisions which were subsequently set forth by the union in Exhibit 16.

7. Belanger admitted that "certain" casual members, who were by and large relatives of union members, were provided with preferential seniority positions as a result of the vote of the membership or the Grievance and Credentials Committee.

#### IV

By March 19, 1984, following the process above, Rodney McLean had worked his way up to the "E" board. On that date, he went on medical disability leave and provided Belanger with a medical report and appropriate letter in support.

Although he was on medical leave from May 4 to September 6, 1984, and from October 18, 1984 until May 15, 1985, McLean nevertheless amassed a total of 62 hours of work through the union hiring hall in 1984. Thereafter, from May 1985 until November 1987, he was absent for medical reasons.

Apparently coincidentally, on March 19, 1984 the union passed a resolution that the "D and E boards are to remain frozen" (Exhibit 37, page 169).

There was some dispute, according to certain witnesses who were involved with the union, as to what was meant by this "freezing" of the boards.

In his initial explanation, Belanger gave his interpretation of what "freezing" of the boards connotes, which we quote essentially verbatim as follows:

*When the boards are frozen, no one's name would go off or on; nothing is to change. There would be no movement until the boards are unfrozen. On each board you must keep average hours. When boards are frozen, the rules that make a board change are suspended. If the boards are frozen, nobody moves. When the casual boards are frozen, nobody moves on or off the board even if they don't have the sufficient hours.*

In point of fact, after giving this explanation, he was shown the seniority list for October 1985 (Exhibit 13) and was asked to explain how J. Pershie (member #34093), who did not work in 1984 and worked only 8 hours in 1985, got on the "G" board in 1985 when the boards were frozen as he had described. He essentially said that he could not provide an explanation having regard to the fact that the boards were frozen and no new members should have been added. He answered the same question with respect to Messrs. Visser (#34103), MacDonald (#34106) and Smith (#35604), in a similar fashion indicating that obviously, notwithstanding the freeze, there were people who were put on the boards. He agreed that all the individuals named were relatives of union members and stated that, although it was not a "union policy" to provide preferential treatment for relatives, "if someone makes a motion and the membership passes it, it becomes policy".

Near the end of his first day of testimony, Belanger unequivocally agreed that the "D" and "E" boards were in fact "frozen" from March 19, 1984 until May 9, 1988. He testified that if they were "unfrozen" at any point during that period there would have to be minutes of a meeting reflecting that fact. And if he found one overnight he would provide us with it. None was provided.

After he gave his initial explanation of what was meant by "freezing", Belanger returned the following day and volunteered a new explanation of what was meant by "freezing" and "unfreezing":

*In the spring of 1984 I took 168 people off the "D" board. I did this when I first arrived. McLean asked for his name to be put back on the "E" board. This went to a general meeting, then 'they' said don't do that anymore; freeze the "D" board and don't take any more people off. So in 1984 terms, that's what freeze meant; so nobody else came off but they had to take applications to put people on. In 1984 the criteria for moving people to the upper boards was high hours.*

Later, he went on to say that in 1985 the general union membership decided that the "A", "B" and "C" boards would be frozen at 35 members each, "and that's what 'freezing' meant with respect to those boards". His explanation concluded that on February 20, 1985, the remaining boards were created on a basis of new seniority lists.

He agreed that there was no set policy for establishing seniority of members placed on the boards and that essentially that was done by union resolution. Following his initial candid explanation, on every occasion that Belanger was asked for a definition of what "freezing the boards" meant, the definition appeared to change, as did Belanger's resolve with respect to its meaning.

Belanger's initial explanation of the term "freezing" is supported by the evidence and is consistent with the position taken by McLean and with the information contained in the investigating officer's report. As set forth below, it is also consistent with the testimony of Kurt Penner and with the union's resolutions.

Kurt Penner (#31650) testified that he worked "out of the bucket" at the union hall from 1982 to 1988. Between 1982 and 1986, he worked only occasionally. However, from 1986 to the present, he worked continuously and fulfilled all the requirements to gain and maintain his position on the casual boards. In 1988, when he obtained board status he was placed on the "F" board (Exhibit 12, page 416). Although he tried to get onto the boards between 1986 and 1988, he was unable to do so because the boards were frozen. According to Penner, during that period, no new applications for board status were therefore being accepted by the union.

Belanger's initial explanation is also consonant with the resolutions passed by the union itself. Specifically, the following resolutions are contained in the union's minutes which were marked as exhibits.

1. March 19, 1984; Exhibit 12 (p.169) "D and E boards are to remain frozen and no dues charged."
2. October 21, 1985; Exhibit 37 (p.289): "M\S\C that the casual boards remain frozen."
3. February 15, 1988; Exhibit 12 (p.411); Executive Committee: "It was moved, seconded and carried to unfreeze casual boards and post applications for board status."
4. February 17, 1988; Exhibit 37 (p.412); General Meeting: "It M/S/C to unfreeze the casual boards and **post applications for board status.**" (emphasis added)

At the meeting following the last resolution above, the Grievance and Credentials Committee granted board status to a number of individuals.

Although the evidence makes it apparent that the "freezing rule" did not apply to relatives of union members, it is nevertheless equally apparent that the rule existed and was enforced vis-à-vis those casual members who did not share in such a fortuitous accident of birth.

Belanger's second volunteered explanation that "freezing" the boards somehow connoted the union's ability to allow new members on but to keep old members from going off, is inconsistent with resolutions passed by the union. Clearly, if that were the case, there would have been no need to pass a resolution, as it did on February 17, 1988, to unfreeze the boards and allow applications for board status.

The evidence, which included various resolutions contained in the minutes relating to board status and board moves, conclusively shows that when the union resolved to freeze the "D" and "E" boards on March 19, 1984, it formally intended that no new applicants would be granted board status and, provided that the minimum hours were maintained, no casual members would lose their relative seniority position on the boards until such time as the boards were unfrozen on February 17, 1988. Thus, any

movements on the boards which adversely affected the seniority of board members, and any admission of new applicants while the freeze was in effect, contravened the union's own formalized policy.

## V

Notwithstanding the fact that the boards were to have been frozen, at a Grievance and Credentials meeting, on January 24, 1985 (Exhibit 12, page 233), the union passed a resolution establishing a seniority list:

*"A work record of C, D, and E board casuals was read by the Committee and a seniority list effective immediately was drawn up, using the formula of years of unbroken (63 hours) service on the waterfront, seniority and average hours (the year of 1983 was not considered for broken service)."*

On February 11, 1985, the same Committee passed a further resolution requiring that:

*"D and E board casuals with less than 63 hours in 1984 will be dropped from the boards."*

Finally, at the general meeting on February 20, 1985 (Exhibit 12, page 241), the union passed the following resolution:

*"M/S/C that D and E board casuals with less than 63 hours in 1984 be removed from the boards."*

As a consequence, McLean was dropped from the "E" board since his records indicated that he had only worked 62 hours in 1984. However, had the union properly applied its own policy, McLean should have been on medical leave and, consequently, would neither have lost his seniority nor been removed from the "E" board. We are satisfied on the evidence that Belanger was aware of McLean's

medical problems and had received the appropriate letter from McLean along with the required doctor's report. However, for reasons which we could not discern he did not process McLean's exemption from the requirement of 63 hours. McLean unsuccessfully contested the union's decision to drop his name from the "E" board at that time.

After his health improved, McLean returned to the hiring hall in 1987 and worked out of the bucket. At this juncture he decided to reinstitute his appeal to be reinstated to the "E" board.

On February 8, 1988, member George Dumont sponsored an application, on behalf of McLean, to the Grievance and Credentials Committee via a letter written by the complainant (Exhibit 26). The letter warrants repetition here:

*"I am writing this letter to request that you review my status as pertaining to my position on the casual boards.*

*In 1984, I was placed on 'E' Board. Not long after this I started a medical leave of absence that went from Oct. 18, 1984 until May 15, 1985. I returned to the Hall and worked and was again off on a medical leave from August 15, 1985 until Sept. 15, 1985. I then returned to work until Sept. 25, 1985 when I was working at Fraser Surrey Dock and had my foot crushed by a falling steel pipe. This was covered by W.C.B. Claim No. XC851113330. I was off work from Sept. 26, 1985 until October 25, 1985. Upon my return to the Hall after this injury I found that my plate had been lifted off 'E' Board in my absence. I do not feel that this was justified in view of the fact that I was off injured at that time. I have made numerous requests to have my plate reinstated but to no avail. I am still at this time not on the boards.*

*I would appreciate it if you could review my situation and if possible place me on the appropriate board where I would be if I had been left on 'E' Board in 1985.*

*My medical records are available for your perusal at your convenience.*

*Assuring you of my interest in this matter at all times, I remain. "...*

When this matter was reviewed by the Grievance and Credentials Committee, it was referred to the Executive Committee. At its meeting of February 15, 1988, the Executive Committee, as a result of McLean's application, decided to "unfreeze" the casual boards. And, oblivious to his appeals to be reinstated to the "E" board, and its own earlier recommendation to approve his application, the Grievance and Credentials Committee (Exhibit 12, page 416) passed a resolution, on March 7, 1988, which put McLean at the top of the "F" board for subsequent board move purposes.

On April 11, 1988, the Grievance and Credentials Committee then resolved "to review seniority of R. McLean at special meeting of credential committee".

On April 29, 1988, McLean appealed the March 7, 1988 decision of the committee stating:

*"Unfortunately I do not understand why I was placed on F Board now in 1988 when I was on E Board in 1985 when my plate was lifted in error. It was my understanding of the previous meeting that my seniority would be recognized from 1984."*

Between April 29 and December 14, 1988, there are a series of resolutions and minutes which indicate that McLean's application to have his seniority status corrected was reviewed at various union meetings. In fact, on December 5, 1988, the Grievance and Credentials Committee passed the following resolution (Exhibit 20, page 465) reinstating the complainant's seniority to March of 1984:

*"M\S\C (McLean) be reinstated to March 1984, on compo from Oct. 83".*

However, at the meeting of December 12, 1988 (Exhibit 20, page 466), the executive committee:

*"... recommends non-concurrence, as confirming documents were not on hand (note March 85)."*

On December 14, 1988 (Exhibit 37, page 468), the general meeting, on the recommendation of the executive, overturned the resolution of the Grievance and Credentials Committee to reinstate the complainant. The fact that this occurred is inexplicable in the circumstances, considering that Belanger's admission that he had in fact received the required medical documents.

In 1991, having been unsuccessful in his attempts to be reinstated to the "E" board, McLean appealed to the Canadian Human Rights Commission for relief. The Human Rights Commission denied his application, determining that it was untimely.

## VI

After the boards were "unfrozen" in March 1988, the union's executive decided to institute a new "file number" list which would track a casual's moves on the casual boards and essentially reflect his "seniority" thereafter.

Gerry White, the then vice-president of ILWU Local 502, assumed the obligation to assign file numbers to individuals on the casual boards. For this purpose, a casual's board "seniority" was assumed to be the position he then held on the boards.

When White assigned numbers to casuals, he did not attempt to rationalize the boards, level the playing field or institute seniority based on established union policy. He did not pay any attention to the original registration dates or to the appropriateness of the position occupied by any of the individuals on the union's casual boards. He simply ascribed a file number, beginning with 500, to the members on the casual boards based on their position on the day he did his numbering process. Wherever a

member's plate happened to be on the day the numbers were ascribed was thereafter to be his file number, and relative seniority, without reference to his registration date, his hours worked, or the appropriateness of his position on the boards vis-à-vis other members.

After a file number was ascribed to a person in accordance with the file number process, that person's number was put on a member's card and inserted in his casual board plate. The plates were then placed on the appropriate casual boards, and subsequent moves were made using the plates to reflect a member's "seniority" position on the boards.

The minutes of a special meeting of the Grievance and Credentials Committee on May 4, 1988 (Exhibit 12, page 432) indicate that:

*"...White presented 'File Number' list to the committee. List accepted by committee".*

According to Belanger, all board moves that were made on the casual boards following May 4, 1988 were to be governed by the file numbers ascribed to individuals by White. A person's relative position on those boards, as reflected by the file number, would thereafter be maintained provided that that person fulfilled all the requirements.

## VII

Section 69 reads as follows:

*"69.(1) In this section, 'referral' includes assignment, designation, dispatching, scheduling and selection.*

*.(2) Where, pursuant to a collective agreement, a trade union is engaged in the referral of persons to employment, it shall establish*

*rules for the purpose of making such referrals and apply those rules fairly and without discrimination.*

*(3) Rules applied by a trade union pursuant to subsection (2) shall be kept posted in a conspicuous place in every area of premises occupied by the trade union in which persons seeking referral normally gather."*

The seminal definition of discrimination referred to repeatedly by this Board and others is contained in a quote from Daniel Joseph McCarthy, [1978] 2 Can LRBR 105 (NS) where Chairman Christie states:

*"In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S., 1969, c.11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy itself is one that bears no fair and rational relationship with the decision being made. The classic example is a rule excluding all applicants with red hair from some position."*

(page 108)

Although the present matter was brought to the Board's attention by McLean's complaint, and for that reason our enquiry focused largely on him, the evidence put before us was not restricted to his unique situation given the broad impact that the union's policy had and will continue to have on all casuals. Although the evidence was largely concentrated on McLean, any breach of section 69, if such existed within the union's referral policy, would not be restricted to McLean nor would be any order the Board might make to remedy the same.

In our view, the evidence was rife with examples of discriminatory union conduct that fell within the definition set forth above. For our purposes here it will suffice to compare the manner in which the union dealt with applications, board status and seniority referrals of casuals who were relatives of union members with the manner in which the complainant and others who were not so related were treated. Thereafter we will examine the consequent effect such treatment had on their board status.

Perhaps the most glaring example of the nepotism that pervaded the union's referral system is found in the minutes of the meetings of the union executive and membership, the foremost of which reserves a special board, the "D" board (euphemistically referred to as the "Daddy's board"), for members' sons and brothers.

At the union executive meeting on December 17, 1984 (Exhibit 33, page 220), the following resolution was made, seconded and carried:

*"M/S/C that the "D" boards be kept for members' sons and brothers, and where there is doubt, the person must apply to the Credentials."*

At the general meeting held on December 19, 1984 (Exhibit 33, page 222), the general membership passed the exact same motion.

Following that, the union further resolved (Exhibit 37, page 227) as follows:

*"... it was moved, seconded and carried, that the Credentials Committee will review the C, D and E boards under the formula adopted at the December general meeting, with retroactive effect to September '84 (C board additions) and a seniority list be drawn up."*

By virtue of these resolutions, the nepotism practiced by the union in its referral process became entrenched as union policy. No resolution revoking that policy was provided to us.

Mr. Brian Ringrose, the current president of Local 502, testified that, as far as he was concerned, the preferential "D" board was revoked sometime in mid-1985. However, when asked to review the names on the membership list of the "D" board as of January 1988 (Exhibit 14), he could identify only 3 (out of 39) individuals who he believed were not relatives of union members. In contrast, James Hoskins, who served as the local's president from 1990 to 1991, testified that during his term of office there was a separate board for members' relatives that was kept in the dispatch office, but was not posted. In cross-examination by counsel for the union, he said that, as far as he knew, the "relative" board no longer existed insofar as it had been removed from the dispatch office by the time he completed his term.

We are satisfied, from the evidence adduced, that the preferential "D" board for relatives of union members was alive and well at least until 1991 and, therefore, critically instrumental in determining the file numbers assigned to the members on the casual list in 1988.

The fact that the policy of nepotism was entrenched, and that relatives of union members received unfair consideration in moving up the boards in preference to those who did not share the same beneficial accident of birth, is reflected, *inter alia*, in the minutes of the union's meetings set out below.

1. Exhibit 12; page 245: Bro. D. Kapan - M/S/C that his son be given one year's seniority
2. Exhibit 12, page 245: Casual W. Macdonald - M/S/C he be granted average hours for 2 year's seniority
3. Exhibit 12; page 246: Casual F. Macdonald - M/S/C he be granted average hours for 1 year's seniority

4. Exhibit 37; page 285 Brother G. Grewal - asking to reinstate his brother who was missed in the February moves. M/S/C he be granted one year for 1984 (S. Grewal 23739).

As indicated earlier, the union's "policy" governing board moves was to have been based on the premise that, to stay on the "D" and "E" casual boards and maintain their seniority position, members would have to work a minimum number of hours each year; failing that, they were to be removed. In practice, however, that requirement, as it related to relatives of union members, appears to have been honoured more in its breach than in its observance.

Notwithstanding that the "D" and "E" boards were frozen from March 19, 1984 to May 9, 1988, it is apparent that certain applicants were given board status and various union-sanctioned board moves, promotions, and grantings of seniority occurred throughout that period.

Although it is not necessary to review the status of each casual affected, it is nevertheless helpful to review the circumstances of McLean, in a representative fashion, to understand how the preferential treatment of members' relatives impacted on the establishment of the file number system in 1988, and its consequent effect on casuals, such as McLean, in the long term.

As indicated above, when White drew up the "file number list" (page 432, Exhibit 12), he used the casual board lists that were presented to him, without investigating the process by which the casual's status on those lists was achieved. Consequently, he simply ascribed a number to individuals on the existing board "seniority" structure which had been arrived at through the machinations of the Grievance and Credentials Committee over the years - particularly from 1984 to 1988 - and which were subsequently approved by general resolution.

It is clear that White proceeded on the basis that the positions of the people on the board, as they appeared as a result of the moves made by the Credentials Committee, were accurate. He did it without considering whether people were properly on the boards in the first place or had the appropriate seniority based on the hours-worked formula established by the union. Therefore, the file number system only served to entrench the unfair and discriminatory process employed by the union in providing preferential seniority positions to relatives of union members. The nepotism became systemic. This systemic unfairness and discrimination is perhaps best illustrated from a review of three Exhibits, namely:

Exhibit 10 - casual list in order of registration date;

Exhibit 11 - comparison of yearly hours for casual employees; and

Exhibit 19 - casual seniority list and casual file numbers dated May 1988.

For ease of reference, Exhibits 10 and 11 are appended to this decision.

A review of Exhibit 10 indicates that during the period of time between October 1985 and February 1988, while the boards were frozen, the union accepted new members and added them to the casual boards. However, no union resolutions were passed to lift the freeze, or to accept applications for board status. The depths of the problem are clearly illustrated by an examination of Exhibits 10 and 11.

On Exhibit 11 the Board has transcribed, in the left-hand margin opposite the name of certain casuals, the "file numbers" assigned by White in 1988.

Via Exhibit 29, the Board received the "Application for Board Status" of five individuals: John Visser, Kelly Smith, John Hopkins, James Bell, and Brad MacDonald. According to the uncontradicted evidence of Kurt Penner, they were all relatives of union members.

1. John Visser's application indicates that he applied for board status in April 1989 and was given registration number 34103. Notwithstanding the fact that his application is dated in 1989, the union assigned a registration date of December 21, 1985.
2. Brad MacDonald completed his application for board status on September 26, 1989. He was nevertheless assigned a registration date of December 1985.
3. James Bell's application was completed on April 29, 1989, and the registration date assigned by the union was August 14, 1987.
4. Kelly Smith completed his application on August 3, 1989, but was assigned a registration date of August 18, 1987.
5. John Hopkins completed his application on April 10, 1989, but was assigned a registration date of August 24, 1987. (On the date of his registration, he would have been 15 years old!).

The date at which the above applicants were given board status is important from a seniority and a board-plate perspective. Insofar as White took the boards as he found them, the date of admission and the corresponding position of a member's plate on the casual boards would determine his "file number" in 1988 and thereafter his board status relative to other casuals.

The applicants mentioned in Exhibit 29 were, as indicated in Exhibit 10, admitted to membership and provided with a registration date during the "frozen" period. However, when numbers were ascribed by White to individuals on the casual boards in 1988, these five gentlemen received file numbers 648, 668, 669, 667, and 662 respectively. Each of them were well ahead of McLean; this is so whether the

complainant's number is 695 as ascribed by White or 686 which the union put on his plate.

The point is perhaps best made in reference to Exhibit 11.

If the boards were frozen as resolved by the union, and if, from 1984 onward, the minimum hours required to stay on the boards was 63, how, except through the process of unfair and discriminatory treatment, did John Visser - who worked 0 hours in 1984 and 8 hours in 1985 - have a seniority number in 1988 of 648?

When viewed through the prism of Exhibit 11, the same enquiry can be made of all of the individuals mentioned in Exhibit 29.

Kelly Smith did not work in 1984, 1985, and 1986, and worked only 32.5 hours in 1987; yet, he was provided with number 668.

John Hopkins did not work in 1984, 1985, and 1986, yet was ascribed number 669.

James Bell did not work at all in 1984, 1985, 1986 and only worked 52 hours in 1987. However, in February 1988, when the union assigned numbers to casual board members, he was ascribed number 667.

Finally, Brad MacDonald was ascribed number 662; but, he did not work in 1984, and worked only 8 hours in 1985, 27.5 hours in 1986, and 112 hours in 1987.

When one looks at Exhibit 11 and those individuals whose assigned "file number" appears in the left-hand column, keeping in mind both the union's 1984 resolution that 63 hours were required to maintain board status, and its resolution to freeze the "D" and "E" boards between 1984 and 1988, there is simply no accounting for the fact that those individuals precede McLean, other than the capricious, unfair and discriminatory conduct of the union.

The union did not dispute the fact that the individuals mentioned above were all relatives of union members; nor did it explain to the Board how or why they were given board status while the boards were frozen; nor did it attempt to justify the positions those individuals held on the casual boards in 1988 when file numbers were assigned.

The evidence of Kurt Penner discloses that the union's breach did not cease in 1988. Penner testified that he obtained union status in March 1988. By the end of that year he had moved to the "E" board. As indicated in Exhibit 14, by March 1989, Penner was ahead of one C. Andersen (#35642) on the "E" board. According to Belanger, the union's numbering system, instituted in May 1988, would ensure that members who preceded other members on the casual board - and maintained minimum hours - would keep their relative seniority positions in all subsequent moves up the casual boards. However, in his uncontradicted testimony, Penner told the Board that, notwithstanding the fact that he preceded Andersen in seniority on the casual boards as of March 1989, and that he maintained the union's annual work and hourly requirements to ensure his continued relative position on the boards, Andersen was, as at the date of Penner's testimony, on the "B" board while Penner was still on the "C" board. According to Penner, Andersen is related to a union member. He also testified that R. Kimmerly (#35696) who, according to Exhibit 10, did not work prior to 1988, also precedes him. Kimmerly, according to Penner, is also the relative of a union member.

The union did not offer any explanation concerning the matters raised by Penner.

As indicated, following the filing of the present complaint, the union promulgated its 1994 referral rules (Exhibit 16). Belanger testified those rules were based upon and essentially reflected the union's referral policy as implemented over the period 1984-1994. That being the case, it is apparent that even the 1994 referral rules are based upon the file number system instituted in 1988.

The board positions held by many casuals were arrived at through a specific union policy entrenched by resolution and implemented between 1984 and 1988. The process the union used to establish casual board referral rules was capricious, unfair, based on nepotism and clearly discriminatory within the definition set forth in Daniel Joseph McCarthy, *supra*. The file number system, instituted by White in 1988, systematized the unfair and discriminatory process which preceded it.

The discriminatory and unfair nature of the union's rules of referral, insofar as they are based upon the numbers assigned in 1988, continues today; each time the union refers affected casuals to a job shift thereunder it continues the discriminatory conduct. As indicated in Clarence Hynes et al. (1988), 75 di 39; and 88 CLLC 16,056 (CLRB no. 708):

*"...This is the first step when deciding whether rules have been applied fairly and without discrimination. If a rule being applied is in itself discriminatory then it matters not whether the rule is being applied equally and universally, the mere application of a discriminatory rule is a prima facie basis for a breach of section 161.1 of the Code."*

(pages 61-62; and 14,400; emphasis added)

We therefore conclude that the union, in establishing and administering its referral system during the period under review, was in flagrant breach of its public obligations under section 69 of the Code. This is so both in its failure to comply with section 69(2) to establish and administer fair and non discriminatory rules for the purpose of making its referrals, and to keep those rules posted in conspicuous places at the union hall pursuant to section 69(3).

## VIII

The union, in essence, based its defence on the issue of the timeliness of McLean's complaint and the facts surrounding the same.

Particularly, the union argues that McLean's complaint(s) with respect to his placement on the seniority list and the complaint with respect to the file number which was assigned to him are one and the same and in any event both are untimely pursuant to section 97 of the Code. The relevant portions of Section 97 read as follows:

*"97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that*

*(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94 or 95; or*

*(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

McLean's complaint, as it relates to his removal from the "E" board in 1985, although meritorious, is clearly untimely. The more substantial aspect of his complaint which relates to the assignment of his file number, through the union's referral policy, is another matter.

According to the union, the confusion concerning the number 686, which was ascribed to McLean until February 1994, and the number 695, which should have been assigned in 1988, was a "clerical" error which was not based on any discriminatory or unfair considerations. Counsel for the union argues that since the confusion was

clerical it could not in itself constitute a breach of section 69 insofar as, by definition, a clerical error could not be seen to be discriminatory or unfair.

The union argues that McLean's current complaint, regardless of how it was restated during the course of the proceedings, stems from the numbering system instituted in 1988 and the seniority structure upon which that numbering system was based. Therefore, the actual basis for the breach of section 69, which McLean alleges, took place more than six years earlier when the numbers were assigned to casual board members. According to the union, that is when the section 97(2) time limitation began to run.

The union further argues that the "clerical error" which led to the assignment of the wrong casual employee number to McLean - which was discovered and complained about by McLean within the section 97(2) limitation period in 1994 - can only be considered a breach of section 69 through reliance on the earlier breach of that section by the union in establishing a seniority list in 1988. In other words, the "clerical mistake" could only be considered a breach of section 69 if the Board reviewed the improper seniority list struck by the union in 1988. The union contends that reference to the 1988 seniority list in the current complaint, is not merely evidentiary but critical since it does not lay bare a breach of section 69 which took place within the limitations of section 97(2) of the Code. Borrowing from the logic employed in National Labour Relations Board v. Pennwoven, Inc. (1952), 194 F. 2d 521 (3rd C.C.A.), as referred to in Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902; (1979), 95 D.L.R. (3d) 25; 25 N.R. 149; and 79 CLLC 14,192, counsel asserts that reference to the earlier breach by the union:

*"...serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labour practise."*

*(Upper Lakes Shipping Ltd. v. Mike Sheehan et al., supra; pages 913; 33; 159; and 15,163)*

## IX

The general principles regarding timeliness and their application in the context of section 97 complaints are well known. The most significant case, upon which the union relies, is Upper Lakes Shipping Ltd. v. Mike Sheehan et al., *supra*. That case concerned an unfair labour practice complaint filed under section 94(3)(a)(ii), alleging that the employer had illegally refused to employ Mr. Sheehan because he had been expelled from trade union membership for a reason other than a failure to pay required union dues.

The Supreme Court of Canada ruled on two specific points: (1) section 16(m) of the Code does not give the Board discretion to enlarge or abridge the time limits imposed by section 97(2) of the Code; and (2) the unfair labour practice was not of a continuous nature.

On the first issue, the Court stated:

*"I read this provision [section 16(m)] as empowering the Board to abridge or enlarge the time for taking steps in a proceeding which is properly before it, as, for example, a certification proceeding. If, however, the issue is whether a proceeding is timely under the Board's governing statute, that is, whether the Board can lawfully entertain it at all in the light of s. 187(2), I do not regard its powers under s. 118(m) as entitling it to give latitude to a complainant who is out of time under the statute. The correlative would be that if it can enlarge it can abridge, and that would be absurd. A complainant is entitled to the advantage and is subject to the limitation of the ninety day period under s. 187(2). It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period."*

(pages 915; 34; 161; and 15,164; emphasis added)

Notwithstanding this ruling on section 16(m), the Board retains complete discretion under section 97(2) of the Code to determine when "the complainant knew, or...ought to have known" of the circumstances giving rise to the complaint.

With respect to the second issue, the Supreme Court of Canada made it clear that in the particular circumstances of the case, the alleged unfair practice in Upper Lakes Shipping Ltd. v. Sheehan, supra, could not constitute a "continuous wrong":

*"... It may be that separate unfair practices can be made out in a particular case, one in respect of a wrongful refusal to reinstate and another in respect of a wrongful refusal to hire. I am not concerned here with such an issue but point to the words of Learned Hand J. in the Childs case to support my view that **the one set of circumstances cannot, by multiplying requests followed by refusals, give rise to a continuous unfair practice.**"*

(pages 912; 31-32; 158; and 15,162; emphasis added)

The issue then, is whether the union's breach of its public duty pursuant to section 69, in the circumstances of the present case, gives rise to a continuous wrong.

In section 50 complaints, for example, the Board has held that since the duty to bargain in good faith is a continuous duty, a complaint may be filed at any time during the collective bargaining process (Iberia Airlines of Spain (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796).

In Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574), the Board explained the rationale for this approach as follows:

*"Mr. Meurin's argument is based on the premise that section 148(a) complaints are in respect of discrete events, and therefore timeliness must be measured in terms of discrete events. We think this approach misconstrues the nature of the duty to bargain in good faith under section 148(a). **Complaints under section 148(a) relate to a course of conduct, rather than to discrete events as such.** The Federal Court of Appeal has already pronounced on the point in Eastern Provincial Airways Limited v. Canada Labour Relations Board et al., [1984] 1 F.C. 732; (1983), 2 D.L.R. (4th) 597; and 50 N.R. 81. There the complaint, with consent, was filed on March 11, 1983 while part of what was found to have violated section 148(a) occurred in April, 1983. If the complaint needed to relate to a specific event, the Board could not have made a finding of breach, since the event was not in the complaint. The Federal Court of Appeal affirmed the Board on this point:*

*'... It [what occurred in April] is, nevertheless, a manifestation of the alleged failure to bargain in good faith as required by section 148. The preamble to the Canada Labour Code [S.C. 1972, c. 18] recites Parliament's intention.*

*'And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all.'*

*That intention to develop good relations between labour and management would not be served by limiting the Board, once seized of a complaint, to consideration of incidents recited in the complaint or antedating it when its subject-matter is, by its nature, ongoing, as here. I find no support for EPA's position in the requirement, by subsection 187(5), of Ministerial consent nor in the consent itself...'*

*(pages 741-742; 603; and 84-85)*

*(It should be noted that the form of the consent was the same as in this case.)*

*Since a complaint alleging failure to bargain in good faith deals with a course of conduct, the 90-day time limit for a complaint about the entire course of conduct starts to run only at the end of the course of conduct. Since we have found the course of conduct to be ongoing and still continuing, there is no timeliness problem."*

(pages 35-36; 374-375; and 14,383; emphasis added)

The Board has considered timeliness as it relates to section 69 on four occasions.

In John S. Cooper (1980), 40 di 28 (CLRB no. 235), the complainant alleged that the union violated section 69 by requiring him to sign a daily registration sheet at the entrance of the union's hiring hall. The complainant wrote a letter to the union on May 23, 1979 referring to the particular circumstances of May 15, 1979 when the union refused to refer the complainant because he had refused to sign the registration sheet. The Board found that the obligation to sign a daily registration sheet does not constitute a rule relating to employment. It referred to the principles set out in Upper Lakes Shipping Ltd. v. Sheehan, supra, and held that the complaint was untimely on the following ground:

*"The letter from the complainant's counsel, dated May 23, 1979, clearly indicates that the complainant would not be registered on the shipping list until he signed the daily registration sheet.*

*In the circumstances, his complaint under section 161.1 [now section 69] was not filed within the time limit prescribed in section 187.2, since it was not 'made to the Board not later than ninety days from the date on which the complainant knew of the action or circumstances giving rise to the complaint'. The same applies to his complaint under section 186, based on the same facts."*

(John Cooper, supra, pages 33-34)

The decision issued in Donald J. Jollimore (1982), 48 di 63 (CLRB no. 368) dealt with an employee who complained on October 13, 1981, that the union affected his opportunity for membership by failing to credit him with hours of work while he was on workers' compensation. The Board dismissed the complaint on the merits and because it found it untimely. In the Board's view, the complainant knew of the circumstances giving rise to the complaint in early 1980:

*"In the circumstances of this case there can be no doubt that Mr. Jollimore was aware of the circumstances giving rise to his complaint early in 1980. He testified before the Board as to his dissatisfaction as late as the fall of 1980. The fact that further efforts after the effective date of the rules resulted in a further refusal from the union does not alter the date of his knowledge of the union's actions which gave rise to his complaint. Mr. Jollimore was well aware of his right to complain to the Board, he has been here before in 1977. The ninety day period for filing complaints had long expired and the complaint is therefore untimely."*

(page 68)

In James Fitton, April 26, 1989, CLRB Letter Decision #717, the complainant was "black listed" in 1986 because of a physical altercation he had on a vessel with the chief engineer. He filed a complaint on November 3, 1988 alleging that the union had not given him an opportunity for employment when jobs became available. Relying on Donald J. Jollimore, supra, the Board concluded that the complaint was untimely because the complainant admitted at the hearing that he knew in 1986 that he was "black-listed" by the union.

In each of these cases however, the Board was not required to address the question of whether the union had established appropriate rules for the purpose of making referrals and applied those rules fairly and without discrimination. The issues rather concerned complaints which related to the grievance of a specific employee that the

referral rules, although clearly established and non-discriminatory per se, were nevertheless discriminatory and unfair in their application for that employee.

Here the Board is concerned with a clear breach of section 69 in the **establishment** of the referral policy. In the circumstances, the union's breach under that section is ongoing.

This principle is confirmed in Mike Sheehan (1980), 40 di 103; [1980] 2 Can LRBR 278; and 80 CLLC 16,030 (CLRB no. 242). Although it involves the same person as in the well-known case of the Supreme Court of Canada mentioned above, the decision was rendered one year after that Supreme Court judgement, which the Board considered in its reasoning.

Mr. Sheehan filed his complaint with the Board on July 6, 1979, alleging that the union violated the then newly adopted section 161.1 (now section 69) in refusing to register him for referral to employment on April 10, 1979. The union refused because, in its president's opinion, no employer would hire Mr. Sheehan. It also submitted to the Board that the complaint was untimely and frivolous.

The Board rejected the union's argument and found the complaint timely. In an examination of the purpose of section 69, the Board explained that the identity of the persons affected by the union's referral system is not necessarily the focus of the Board's enquiry into the fair and non-discriminatory application of the referral rules, in that the referral system, in itself, has to be fair and applied on a continuing basis:

*"As a prelude to the question of timeliness, let us examine section 161.1 quoted above. The background and statutory context of this section were canvassed recently in Keith Sheedy 39 di 36. They need not be repeated here. The abuse that a union referral system could become subject to was described as follows:*

*'Like any source of employment or agency for employment, the union hiring hall can become an*

*instrument of discrimination. It can be operated in a manner such that it discriminates for reasons generally prohibited by human rights legislation (This form of discrimination is addressed in the Canadian Human Rights Act., S.C. 1977, c.33. See sections 9, 10 and 33(b)(i)). On a less general level, it can be used by those controlling it as an instrument to discriminate against political opposition within the union, or to discriminate against personal enemies, or as an instrument of favouritism and punishment to be used to maintain control over union members or other persons seeking employment.' (p.13)*

*Prior to 1978 the various legislative provisions addressing union membership rights and job security were not a complete regulation of the potential problems.*

*'These provisions are an incomplete legal regulation of the scheme of union security permitted under the Code in that they do not address circumstances where employees have no long-standing relationship with a single employer and unions control access to employment with various employees through union hiring halls'. (p.11)*

*Sections 161.1 and 136.1 seek to fill the gap.*

*The method is straightforward. Unions operating a referral system pursuant to a collective agreement must establish rules governing referrals (section 161.1(3)). They must post those rules (section 161.1(2)). Then they must apply the rules 'fairly and without discrimination' (section 161.1(1)). The purpose is to avoid unfair and discriminatory operation of referral systems. Obviously, the rules must not in themselves be unfair or discriminatory. If they are, no matter how even-handedly they are administered the purpose of the legislation will be mocked. (That is not an issue here).*

*What is significant about the evil sought to be redressed or avoided and the regulatory scheme invoked is that it is first and foremost legislation with a general public purpose. The concern is with the administration of the referral system. The referral system is intended to operate in a fashion of general benefit to prospective employees, which may in the circumstance be only union members or a mixture of members and prospective members. The union's obligation is to the manner in which the system is operated with those affected being viewed as nameless, faceless persons who may be categorized under the rules as members, members in arrears,*

*new members, non-members, transferred members, etc. Favouritism, nepotism, punishment and individualized treatment are not to be a character of the administration. Of course, exceptional circumstances may require exceptional rules.*

*In this spirit Board officers make occasional checks to ensure rules are established and posted. Uninformed unions are advised about the existence of section 161.1. The Board does not wait for individuals to complain about the application of the rules to them. Persons not adversely affected themselves have an interest in the administration of the rules. They may be adversely affected in the future. Employers have an interest in the rules. Complaints may come to the Board from a variety of sources. One or several persons may be wronged. Those wrongs must be redressed when fair and non-discriminatory administration is re-established. **The identity of those wronged is not central to the Board's inquiry into the administration of the system.** The administration may fluctuate from fair and non-discriminatory to unfair and discriminatory from season to season, year to year, or month to month. **The Board's task is to keep it on the straight and narrow. Because the same person is adversely affected more than once is incidental. It may be important in fashioning a remedy but it cannot affect the Board's inquiry into how the referral system is being operated. An unfair administration cannot be permitted to continue to operate unfairly because the person complaining is, insofar as it affected him, beyond the ninety-day period in section 187(2). To interpret sections 187(2) and 161.1 in this fashion would flaunt unreasoned logic to serve unfairness.***

*This is the key distinction between section 161.1 and sections 184(3)(a)(ii) and 185(f) as they relate to section 187(2). The latter two, addressed in early cases, were viewed primarily as individual wrongs. Therefore one looked to the individual and his relation with employer or union to measure timeliness. That was done and in both cases Sheehan's complaints were found untimely. **The administration of a referral system is a continuous process which must each time it is used be administered fairly and without discrimination.**"*

(pages 117-119; 289-290; and 634-636; emphasis added)

The union's argument herein presupposes that section 69 does not create an ongoing obligation on the union, but rather one similar to that which is contemplated by, for

example, sections 37 and 95. Those sections are designed to be remedial in nature and directed to redress complaints of contravention that are both discrete as well as time and employee specific; this is readily apparent from a review of the discretionary remedies, available to the Board in those instances, as described in sections 99(1)(b), (e), (f).

In the first three cases in which the Board dealt with the timeliness of a section 69 complaint, it found that the complaint was untimely, implying that the circumstances giving rise to the complaint related to a discrete set of events. Such is not the case here.

In our view, the legal obligation imposed on the union, pursuant to section 69, is not necessarily employee or event specific. Section 69 enshrines a compulsory obligation for a union to create and post fair and non-discriminatory referral rules; and, thereafter, to administer those rules in a fair and non-discriminatory fashion. It is an obligation of general public interest which endures from year to year, day to day, and shift assignment to shift assignment. If the referral rules which established the referral policy are themselves tainted with discrimination, the application of those rules continues the discriminatory conduct. In essence there is, in the circumstances described, a continuous wrong.

Consequently, the implementation of systemically discriminatory rules continues the "wrong" which those rules perpetrate, and the time limit would not begin to run until the breach of section 69 has ceased.

*"The adoption by a company of a personnel management policy, one of whose components would systematically gut the basic provisions of the Code, cannot be considered merely an isolated contravention that is limited in time. Where a contravention occurs that is, by its very nature, ongoing, it cannot be artificially frozen in time, thereby limiting the period of time for challenging it. It has always been said, of the obligation to bargain in good faith, that it applies throughout the negotiations. This is especially true of what could*

*be termed the ongoing obligations that arise from section 8 and that apply permanently to the conduct of the partners governed by the Code.*

*This being the case, the intent of section 97(2), as regards the timeliness of a complaint, is not to ensure that a party that systematically contravenes the Code can do so with impunity, but rather to prevent repeated proceedings. In this type of case, the time limit does not begin to run until the unlawful conduct has ceased. In the instant case, this would apply to the policy itself."*

(Air Alliance Inc. (1991), 86 di 13; and 92 CLLC 16,013 (CLRB no. 887); pages 22; and 14,092-14,093; emphasis added))

The adoption of a policy which, per se, contravenes the provisions of the Code, cannot, in its application, be treated as an isolated event. In the present circumstances, the unfair and discriminatory conduct entrenched in the union's referral policy, as reflected in its present "file number" system, may properly be the subject of a complaint until the union ceases to contravene section 69.

Finally, in Sheehan, *supra*, the Board held that even if the complainant's identity was relevant, the complaint filed on July 6, 1979 would be timely as the complainant first learned of the circumstances giving rise to the complaint on April 10, 1979. The Board's decisions in Alex J. Cayer (1980), 39 di 108; [1980] 3 Can LRBR 225; and 80 CLLC 16,052 (CLRB no.246); and Gary Meagher (1980), 41 di 95 (CLRB 258), reflect a similar position. Although they do not discuss timeliness, each refers to the non-individual character of the duty of fair referral. In Gary Meagher, the Board recognized that, although the rules or their intended effect might not be unfair or discriminatory with respect to a particular individual, there might well be a violation of section 69 in more general terms if the process of establishing rules is not followed.

Therefore, notwithstanding our earlier determination that the nature of the union's breach is ongoing, if the identity of McLean and the discrete circumstances which prompted his complaint are relevant, we are satisfied that Mclean's complaint with respect to the union's "mistake" in assigning him number 686, and its subsequent attempt to make amends by moving him down the seniority totem with the assignment of number 695, is timely insofar as he only learned of it on February 4, 1994, and lodged his complaint with the Board within 90 days. We do not believe he knew or ought to have known previously that even in the perverse numbering system established by the union in 1988, he was given the wrong number. Whether the error was clerical or not, it provided the basis for McLean's complaint and exposed the union's broader breach.

In our view, the union's conduct, brought to light in this case, constituted an ongoing breach of section 69 for which time continued to run during the entire period of the implementation of the perverse file number system. It matters not that the referral process complained of was formalized in 1988. Whenever casual members are assigned work pursuant to the union's obligations under section 69, the section is breached by virtue of the implementation of a formal union policy established through a clearly unfair and discriminatory process.

In the result, the ILWU's failure to establish fair and non-discriminatory referral rules and apply them as required by section 69, is in the nature of a continuing breach of the Code for the purposes of the application of the limitation provided in section 97(2) of the Code.

Accordingly, McLean's complaint, insofar as it relates to the union's referral system as reflected by the assignment of file numbers, is timely and is allowed.

X

Although, for the purposes of this decision, the Board concentrated, to a large extent, on facts that were specific to McLean, the union's breach of section 69, as disclosed by the evidence, had a general effect on all casuals who were deleteriously affected by the preferential treatment provided to relatives. Any remedy which the Board directs, and the union implements, must therefore assist all affected casuals in re-establishing their appropriate positions on the boards.

The Board is always, as it should be, circumspect before it issues orders that are designed to remedy a union's breach of its internal operating obligations. In Donald Jollimore, supra, the Board made the following comments:

*"...Unless someone can show that the [dispatch rules] are in themselves discriminatory or that they are applied in a discriminatory manner then this Board will not intervene in the union's internal affairs."*

(page 68)

We agree with that sentiment and are loathe to insert the Board's directives into the operation of what should be the union's sole domain. However, the Board's hesitation and reluctance to get involved in a union's internal affairs cannot result in an abdication of its statutory obligations.

It is perhaps trite but nevertheless warrants noting that nepotism and the discriminatory conduct which the union engaged in here was, in many respects, the order of the day and regarded "acceptable" for many years in more corporate and

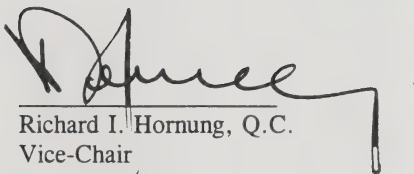
union organizations than most of us would care to admit. What the union members did in entrenching, by resolution of the general membership, a long- standing practice of preferential treatment was to recognize what was widely regarded in some circles as being "acceptable" and "appropriate" or at worst "just the way things are done".

Counsel for the union contends that with the promulgation of the 1994 rules, the union addressed any future breach of section 69 and therefore the Board need not now remedy the problems of the past. He argues that we should consider the calamitous consequences for the union, if we determine that a breach had occurred, and the difficulty that the union would face remedying the same, having regard to the displacement and disruption of members up and down the boards that would ensue.


Although the consequences of any Board order that might issue to correct the unfairness caused by the union's breach of section 69 will, for some, be severe, we cannot let the extent of the consequences colour our determination as to the occurrence of the breach itself. Because it will be difficult to rectify does not mean that the union's breach can go unchallenged or that the consequences of the perverse board structure can continue for the next generation until rectified through the dissipation of affected members or the passage of time.

Implementation of any Board order will require a great deal of good faith and responsibility on the part of all union members and casuals. Individuals will necessarily be displaced from their current positions on the boards. The harmonious operation of the union hiring hall will depend on the good faith of all its members. It is therefore of paramount importance that, as far as possible, the parties participate in fashioning a remedy that will ensure compliance with the union's obligations under section 69 and, while acceptable to the Board, will remedy the problem and serve the larger labour relations interests of all concerned.


With that goal in mind the Board, pursuant to section 20 of the Code, will retain jurisdiction to order a remedy herein and directs that the hearing of this matter be reconvened in order to provide the parties with an opportunity to address the issue of fashioning an order and appropriate remedies.



Richard I. Hornung, Q.C.  
Vice-Chair



Patrick H. Shafer  
Member



Véronique L. Marleau  
Member

## CASUAL LIST IN ORDER OF REGISTRATION DATE

REGISTRATION DATE	WORK NUMBER	NAME	AGE AT REGISTRATION
10/06/71	13789	SINGH, D	17yrs 2 mos
09/07/71	14333	DEBRUYN, D	18 YEARS
17/07/71	14905	SMITH, D.	18yrs 5 mos
1/10/71	16143	MCLEAN, R	19yrs 11mos
24/01/72	16034	JOHNSON, A.	32yrs 1mos
18/10/72	18399	MCILAUHLIN, R.	?
18/6/74	21213	IRWIN, R.	21yrs 3mos
15/10/76	23842	ROBILLARD, G	19yrs 6mos
11/10/77	25609	FLYNN, D	24yrs 3 mos
9/2/78	25806	WHITLEY, V	?
30/5/80	29296	CORRELL, L	?
26/6/80	29321	MAYERS, M	17yrs 2 mos
1/1/80	29354	RYLAND, T	19 yrs
7/7/80	18752	CRAIG, F	23yrs 7mod
10/12/80	29989	KISTICK, J	19yrs 3 mos
2/1/81	30003	SANSKERGRET, D	17yrs 6 mos
19/2/81	30051	KISH, L	17yrs 3mos
11/3/81	30093	BUTLER, M	?
3/4/81	30127	UNILOUSKI	20yrs 8 mos
22/6/81	30576	CARLSON, W	?
4/12/81	31548	HUMPHREYS, R	17yrs 8 mos
02/01/82	31578	GRIFFITHS, R.	?
02/01/82	31580	STONEHOUSE, D	?
02/01/82	31581	STONEHOUSE, K.	?
01/02/82	31613	GOLDSTONE, T	16yrs 10 mos
25/03/82	31630	MATTE, R.	30yrs 9mos
24/08/82	31979	WALKER, B.	?
8/10/82	31987	HEIKKINEN, K	?
17/01/83	32002	TOMAS, B.	31yrs 5 mos
21/04/83	32017	HITT, M	25yrs 2 mos
23/04/83	32018	KAPAN, M.	15yrs 4mos
14/06/83	32022	BELANGER, P	16yrs 6mos
27/12/83	32072	ONEIL, C.	?
27/12/83	32073	AMUNDSEN, E	19yrs 2mos
22/3/84	32096	DEBRUYN, D	19yrs 4 mos
16/4/84	32099	CHEVALIER, L	15yrs 10mos
23/6/84	33487	TETRAULT, D	16yrs 8mos
24/06/84	33466	DEBRUN, D	18yrs 7mos
13/07/84	33481	NIELSON, L.	17yrs 3mos
15/08/84	33516	LAMBINSKI, R	28yrs 1mos
25/10/84	33532	HOPKINS, W.	16yrs 5mos
02/01/85	33564	BELANGER, M	15yrs 11mos
29/01/85	33571	ERICKSON, D	17yrs 5mos
06/02/85	33573	PERSHIE, N	?
16/02/85	33574	PEDERSON, T	18yrs 1mos
04/05/85	33586	STONEHOUSE, S.	16yrs 1mos
19/05/85	33589	MCINTYRE, L	?
04/07/85	33598	WILSON, J	?
Boards were frozen in			October 1985
22/10/85	34093	PERSHIE, J.	16yrs 2mos
16/12/85	34103	VISSER, J	?
17/12/85	34106	MACDONALD, B	18yrs 10mos
24/02/86	34117	BIRMINGHAM, J	16yrs 4mos
04/07/87	34137	MACDONALD, D	?
14/08/87	35598	BELL, J.	17yrs 4mos
18/08/87	35604	SMITH, K	18yrs 3mos
24/8/87	35606	HOPKINS, J.	15yrs 6mos
24/8/87	35610	CHABAUTY, G.	15yrs 8mos
17/11/87	35641	SMITH, C.	20yrs 5mos
26/12/87	35655	JOHNSON, S.	20yrs 6mos
19/01/88	35673	DORAN, P	?
11/02/88	35697	KOYA, S	?
BOARDS WERE REOPENED IN			FEBRUARY 1988

## COMPARISON OF YEARLY HOURS

WK #	EMPLOYEE	REG. YR	1983	1984	1985	1986	1987	1988
14333	DEBRUYN, D	09/07/71		286.00	817.00	556.50	1204.00	1735.50
9354	RYLAND, T	02/07/80	34.00	63.50	546.00	367.50	641.00	1133.00
29989	KISTIUK, J	29/12/80	17.00	140.50	431.50	337.50	382.00	934.00
31548	HUMPHREYS, R	04/12/81	25.00	154.50	381.00	169.00	241.00	735.50
31578	GRIFFITHS, R	02/01/82	48.50	223.00	327.50	228.50	340.50	1117.50
31630	MATTE, R	25/03/82	40.00	125.00	539.50	361.00	574.00	987.50
31979	WALKER, B	24/08/82	11.50	48.00	47.50		47.00	195.00
21213	IRWIN, R	18/06/74	23.50	169.00	563.50	149.00	353.50	1132.00
25609	FLYNN, D	31/10/77	31.50	109.50	343.50	232.50	558.00	1172.00
31971	PILON, P	29/06/82	68.00	184.00	165.50	80.50	176.50	730.25
30051	KISH, L	19/02/81	70.50	66.50	353.00	172.50	615.00	1441.00
31973	BRIGGS, W	23/07/82	95.00	238.00	202.00	72.00	193.00	776.50
30003	SAMSKERGRET	02/01/81	37.00	78.50	509.00	200.50	247.00	1067.00
30127	UNILOUSKI, P	03/04/81	41.50	79.00	156.00	125.50	179.50	779.50
32002	TOMAS, B	17/01/83	62.00	183.00	722.50	836.00	8.00	986.50
32017	HITT, M	21/04/83	32.00	98.50	485.00	314.00	419.50	948.00
32018	KAPAN, M	23/04/83	19.50	80.00	205.50	252.00	278.00	927.25
32022	BELANGER, P	14/06/83	100.50	455.00	394.00	121.50	325.00	1138.50
13789	SINGH, D	10/06/71		122.50	387.00	130.50	198.25	604.00
615 — 14905	SMITH, D	17/07/71		24.00	239.50	8.00	20.00	28.50
16034	JOHNSON, A	24/01/72		261.50	671.00	79.50	264.50	735.00
18399	MCLAUGHLIN, R	18/10/72		183.50	257.70	109.50	100.00	31.50
23842	ROBILLARD, G	15/10/76		412.50	518.00	226.50	447.50	867.00
25806	WHITLEY, V	09/02/78		142.50	478.00	180.00	137.00	556.00
30576	CARLSON, W	22/06/81	16.00	376.00	491.00	106.75	264.50	708.00
32072	ONEIL, C	27/12/83		156.00	361.50	336.50	376.50	771.50
32073	AMUNDSEN, E	27/12/83		195.00	475.00	158.50	285.50	128.00
32096	ADBRUYN, D	22/03/84		213.00	329.50	128.00	402.50	1074.50
32099	CHEVALIER, L	16/04/84		123.50	175.50	55.50	142.50	885.00
18752	CRAIG, E	07/07/80			307.50	191.00	16.50	595.50
33481	NIELSON, L	13/07/84		119.00	200.00	56.00	93.50	870.50
33487	TETRAULT, D	23/06/84		88.50	288.50	143.00	321.50	975.00
9259	GREENIZAN, T				185.50	118.00	398.00	623.50
33532	HOPKINS, W	25/10/84			328.00	110.50	340.50	932.50
33564	BELANGER, M	02/01/85			230.00	93.50	423.50	894.00
645 — 33573	PERSHIE, N	06/02/85			143.50	87.50	119.50	718.50
653 — 34093	PERSHIE, J	22/10/85			8.00	40.00	160.00	761.50
648 — 34103	VISSER, J	16/12/85			8.00	97.00	287.50	712.50
649 — 34117	BIRMINGHAM, J	24/01/86				147.00		
651 — 33516	LABINSKI, R	15/08/84		101.50	191.25	56.00	182.50	818.00
656 — 33466	DEBRUN, D	26/06/84		68.00			131.50	1057.50
654 — 31613	GOLDSTONE, T	01/02/82			23.50	80.00	24.00	23.50
655 — 33571	ERICKSON, D	29/01/85			150.50	63.00	126.00	395.75
661 — 33574	PEDERSON, T	16/02/82			62.00	20.50	72.50	150.00
662 — 34106	MACDONALD, B	17/12/85			8.00	27.50	112.00	1027.00
666 — 34137	MACDONALD, D	04/07/87				31.50	151.00	669.50
667 — 35598	BELL, J	14/08/87					52.00	162.50
668 — 35604	SMITH, K	18/08/87					32.50	704.50
669 — 35606	HOPKINS, J	24/08/87					88.00	688.00
670 — 35610	CHABAUTY, G	24/08/87					102.00	704.00
679 — 35641	SMITH, C	17/11/87						
681 — 31987	HEIKKINEN, K	08/10/82	62.00	125.00	325.50	37.50	9.00	284.50
682 — 29321	MAYERS, M	26/06/80		95.00	545.50	48.00	8.00	559.50
683 — 35053	FAYE, T							
684 — 29296	CORNELL, L	03/05/80	8.00	22.50		8.00	15.50	651.00
685 — 30093	BUTLER, M	31/03/81	23.50			7.50		485.00
686 — 33589	MCINTYRE, L	19/05/85				16.50		16.00
687 — 33598	WILSON, J	04/07/85			7.50	15.50		124.00
688 — 35655	JOHNSON, S	26/12/87					19.50	374.50
689 — 35673	DORAN, P	19/01/88						
690 — 35696	KIMMERLY, R	01/03/88						448.50
691 — 35697	KOYA, S	11/02/88						130.00
692 — 31580	STONEHOUSE, D	02/01/82	57.00	162.50	189.00	220.00	8.00	166.00
694 — 31581	STONEHOUSE, K	02/01/82	49.00	176.50	277.00	87.00		
695 — 33586	STONEHOUSE, S	04/05/85						
696 — 16143	MCLEAN, R	01/10/71	8.00	62.00	35.00	8.00	187.50	1231.00
AVERAGE HOURS BY YEAR			40.85	154.15	307.89	149.16	234.60	704.65



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## Summary

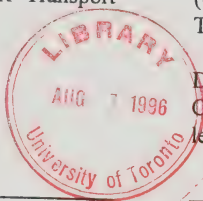
Ronald Shanks, *complainant*, Transportation Communications International Union (CLC), *bargaining agent*, and CANPAR Transport Ltd., *employer*.

Board File: 745-5083  
CLRB/CCRT Decision no. 1157  
June 26, 1996

## Résumé

Ronald Shanks, *plaignant*, Syndicat international des transports communication (CTC), *agent négociateur*, et CANPAR Transport Ltée, *employeur*.

Dossier du Conseil: 745-5083  
CLRB/CCRT Décision n° 1157  
le 26 juin 1996



Ronald Shanks filed a complaint alleging that the Transportation Communications International Union (CLC) breached section 37 of the Code by neglecting to deal with two of his grievances and by not referring them to arbitration.

Ronald Shanks a déposé une plainte alléguant que le Syndicat international des transports communication (CTC) avait enfreint l'article 37 du Code en négligeant de s'occuper de deux griefs qu'il avait déposés et en ne les renvoyant pas à l'arbitrage.

The two grievances submitted in 1992 dealt with a shortfall in vacation pay and the payment of benefits during Mr. Shanks' disability. Both were sent to the employer for response in April 1993. Two years later, in May 1995, when Mr. Shanks filed his complaint with the Board, the union had not acted to either close, settle or submit the grievances to arbitration.

Les deux griefs déposés en 1992 portaient, dans le premier cas, sur des allégations de paye de vacances incomplète et, dans le deuxième cas, sur le paiement de prestations pendant une période d'invalidité de M. Shanks. Les deux griefs ont été présentés à l'employeur en avril 1993 afin que ce dernier puisse y répondre. Deux ans plus tard, soit en mai 1995, au moment où M. Shanks a déposé sa plainte auprès du Conseil, le syndicat n'avait entrepris aucune démarche en vue de fermer les dossiers des griefs, de les régler ou d'en saisir un arbitre.

As a preliminary matter the union argued that the grievance which dealt with the payment of health benefits during disability was not arbitrable as Mr. Shanks was seeking the application of section 32 of Quebec's Act Respecting Industrial Accidents and Occupational Diseases, R.S.Q., C-A 3.001.

En préliminaire, le syndicat a fait valoir que le grief portant sur le paiement de prestations d'invalidité ne pouvait être renvoyé à l'arbitrage, puisque M. Shanks invoque l'article 32 de la Loi sur les accidents de travail et les maladies professionnelles du Québec, L.R.Q., C-A 3.001. Toutefois, étant

Given that there was an applicable collective agreement which dealt with the benefits claimed by Mr. Shanks, the Board, while declining to interpret the scope and application of the relevant provision of the agreement, concluded that it had the appropriate jurisdictional basis to deal with the complaint.

On the merits, the union admitted that it neglected and mishandled the grievances and explained that this was due to lack of experience and poor communication between two full-time officers of the respondent. The Board found that the issue was not one of simple error or poor communication. The union did not turn its attention to the merits of the grievances and having in effect abandoned their pursuit, allowed them to languish without resolution for a period of two years. The Board concluded that the union's prolonged neglect and inaction in light of repeated requests from the complainant constituted serious negligence and a breach of the duty of fair representation.

donné que les prestations réclamées par M. Shanks sont régies par une convention collective en vigueur, le Conseil, bien qu'il refuse de se prononcer sur la portée et l'applicabilité des dispositions pertinentes de la convention collective, conclut qu'il a la compétence voulue pour s'occuper de la plainte.

Sur le fond de l'affaire, le syndicat admet qu'il a négligé les griefs et ne les a pas bien traités; il explique que sa façon d'agir découlait d'un manque d'expérience et d'un problème de communication entre deux dirigeants syndicaux à plein temps. Le Conseil en est venu à la conclusion qu'il ne s'agissait pas d'une simple erreur ou d'un problème de communication. Le syndicat n'a pas accordé l'attention requise au bien-fondé des griefs et qu'ayant négligé dans les faits d'y donner suite, il a laissé s'éterniser ces griefs non réglés pendant deux ans. Selon le Conseil, la négligence et l'inaction prolongées du syndicat, malgré des demandes répétées de la part du plaignant, constituent un cas grave de négligence et un manquement au devoir de représentation juste du syndicat.

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## Reasons for decision

Ronald Shanks,

*complainant,*

*and*

Transportation Communications International  
Union (CLC),

*and*

CANPAR Transport Ltd.,

*employer.*

Board File: 745-5083

CLRB/CCRT Decision no. 1157

June 26, 1996

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The Board was composed of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair, and Ms. Véronique L. Marleau and Ms. Roza Aronovitch, Members. A hearing was held on November 14, 1995 in Montréal.

### Appearances

Mr. Ronald Shanks, on his own behalf, accompanied by Mr. René Pichette, Grievance Officer, Local 2347, Transportation Communications International Union (CLC); Ms. Kathleen Cahill, accompanied by Mr. Dennis Dunster, Executive Vice-President, (TCU) Trucking Unit, for the respondent; and Ms. Linda Facchin, accompanied by Mr. Robert Dupuis, Regional Manager, CANPAR Transport Ltd., for the employer.

These reasons for decision were written by Ms. Roza Aronovitch, Member.

## **I - The Application**

These reasons deal with Mr. Shanks' complaint of breach of the duty of fair representation by the Transportation Communications International Union (TCU or the Union) filed with the Board on May 19, 1995. Mr. Shanks alleges that the Union violated section 37 of the Canada Labour Code by neglecting to deal with his grievances and by not referring them to arbitration.

Specifically, at issue is the Union's handling of two grievances submitted in 1992 which as of April 18, 1993 were awaiting response from the employer representative and had reached step 3 of the grievance procedure.

The facts in this case are complicated by reason of Mr. Shanks' prior complaint to the Board dealing with the Union's handling of part of one of these two grievances, more specifically, part of the original grievance referred to below as the Vacation Pay grievance. The Board decided that complaint in 1994. The circumstances of that complaint and its relation to this case will be explained in these reasons.

## **II - Background**

Ronald Shanks was a driver employed by CANPAR, a division of Canadian Pacific Express and Transport. He sustained work-related injuries and, as a result, has been on worker's compensation since April 1992.

In September and October 1992, Mr. Shanks filed two grievances. The first grievance (SunLife), dated September 29, 1992, dealt with the continuation of Mr. Shanks' medical benefits with SunLife Insurance during his disability. He requested information, complained of the absence of reliable information concerning the payment of premiums and claimed from the employer any amounts denied to him by SunLife as a result.

On November 3, 1992, Mr. Robert Dupuis, Regional Manager of CANPAR, wrote to Mr. Gauthier, the then Union Representative, regarding the SunLife grievance and Mr. Shanks' request for information. He provided some information in response to questions raised in Mr. Shanks' grievance regarding the continuation of benefits including dental coverage. At the same time he denied any responsibility for "monies lost from SunLife." As a result, on April 28, 1993, Mr. J.R. Marr, the then Vice-President of TCU, wrote to Mr. Paul McLeod, the Director of Terminals at CANPAR, regarding the SunLife grievance, attaching the grievance as well as Mr. Dupuis' reply. He indicated that Mr. Dupuis' denial of responsibility was of concern to him and requested that Mr. McLeod "investigate the matter and arrange proper settlement."

The second grievance (Vacation Pay) dealt with the employer's refusal to pay Mr. Shanks' vacation pay. The grievance was made up of two elements: the first dealt with the payment of vacation pay at the rate of 8% of Mr. Shanks' gross annual salary; the second element was an additional \$10.00 a day penalty on late payment requested by Mr. Shanks in accordance with his interpretation of the collective agreement. The Union disagreed with Mr. Shanks' interpretation, and disallowed his request for the payment of the \$10.00 a day penalty. The Union did however proceed to seek payment of 8% of his gross annual salary. Eventually, Mr. Shanks received some payment on account of vacation pay but it was apparently based on an erroneous calculation. Accordingly, on April 28, 1993, Mr. J.R. Marr wrote to Mr. McLeod at CANPAR requesting payment on the basis of 8% of Mr. Shanks' gross annual earnings. There was no mention of the \$10.00 a day penalty in this letter, as that request had already been disallowed by the Union.

To summarize, as of April 1993, the two grievances at issue in this complaint had been sent to Mr. McLeod, the Company representative, for response.

In June of the same year, Mr. Shanks filed a complaint alleging a breach of the duty of fair representation with the Board on the basis that the Union had decided not to refer the part of the original Vacation Pay grievance dealing with the \$10.00 penalty to arbitration. That complaint was later dismissed by the Board (see Ronald Shanks, February 8, 1994 (LD 1261)).

Having instituted proceedings with the Board, he also attempted to obtain information on the status of a number of other outstanding grievances. Thus in January 1994, Mr. Shanks telephoned Mr. Dunster, the Executive Vice-President of the Union, and later followed up with a registered letter to Mr. Dunster dated January 25, 1994. He emphasized the difficulty he was having in reaching or communicating with members of the Union, be it Mr. Dunster or Mr. Dubois, the Vice-President in charge of Quebec. In substance, he was requesting information regarding a number of grievances including the SunLife grievance, which he characterized as being "in limbo."

Mr. Shanks explained in the correspondence that these grievances had been sent to Mr. Paul McLeod of CANPAR in April 1993, for response. The Union ought to have heard from Mr. McLeod by then, failing which, in his view, it was obliged, in accordance with the collective agreement, to refer the grievances to arbitration. The complainant emphasized to Mr. Dunster that he hoped that the outstanding grievances could be settled without once again having to have recourse to the Board and, in closing, requested that the grievances either be settled or arbitration dates set in accordance with "article 9.1 and steps 3 and 4 of the collective agreement."

In response, Mr. Dunster requested Mr. Dubois to look into the matter at the local level. Following verification, Mr. Dubois wrote to Mr. Dunster on February 21, 1994 to report on the status of the complainant's grievances. He indicated the grievances he believed to be closed; regarding the SunLife and Vacation Pay grievances, he indicated: "no answer from Paul McLeod."

In August 1994, Mr. Dubois wrote to Mr. Shanks following a telephone conversation and attached to this letter the status report of February 21, 1994 addressed to Mr. Dunster. Mr. Shanks responded on August 31, 1994, reminding Mr. Dubois that during a conversation in July, Mr. Dubois did not have "a clue" about his grievances when he had in fact provided a status report to Mr. Dunster in February. Mr. Shanks requested specific information with respect to grievances which were apparently closed. As to the SunLife and Vacation Pay grievances, he stated that after one year without an answer from Mr. McLeod, the Union was obliged to set the matter down for arbitration.

Mr. Shanks received no further news or information from either Mr. Dunster or Mr. Dubois regarding the two grievances at issue. In February 1995, roughly a year after their first conversation, Mr. Shanks again contacted Mr. Dunster. During the conversation that ensued, Mr. Dunster told Mr. Shanks that he did not have the files in his possession. He confirmed this in writing on February 10, 1995 and undertook to contact Mr. Dubois to obtain copies of the grievances. In the meantime he asked Mr. Shanks to send all relevant documentation to his attention. Mr. Dunster also asked Mr. Shanks to update him on his medical condition, stating that if the injury had occurred before the sale of CANPAR, the liability would be with Canadian Pacific Limited, the prior owner/employer. In closing, Mr. Dunster promised to keep Mr. Shanks advised and welcomed hearing from the complainant.

Mr. Shanks received no further news and did not respond until May 10, 1995, when he wrote to Mr. Dunster enclosing copies of the grievances. He went on to explain that the total amount claimed for the SunLife grievance on account of dental expenses was \$1,643.00. The amount claimed for the Vacation Pay grievance was an underpayment of \$531.00 based on a payment of 8% of gross annual earnings and a \$10.00 a day penalty for every day until the grievance was settled, which he estimated at roughly \$9,000.00. The latter sum claimed by Mr. Shanks was for a penalty that had been disallowed by the Union and was in 1994 the subject of a

decision in which the Board dismissed Mr. Shanks' complaint. Mr. Shanks continued to believe however that his claim was still active.

In the same letter of May 10, Mr. Shanks went on to complain of numerous letters and calls to Mr. Dunster, Mr. Boyce, the National President, as well as Mr. Dubois from whom he had received "zero response." He criticized the Union for closing his files in anticipation of his not returning to work. By letter of the same date, Mr. Shanks then wrote to the Board complaining of the Union's neglect, pointing out that he was asked in February 1995 to provide copies of grievances he had lodged in 1992, when he believed that Mr. Dubois had already sent copies of the grievances to Mr. Dunster and both Messrs. Dunster and Dubois were well aware that the employer representative had provided no response.

### **III - Preliminary Issues**

At the hearing, counsel for the Union raised two preliminary issues.

Ms. Cahill recalled that in June 1993, Mr. Shanks had filed a section 37 complaint with the Board regarding the Union's handling of one aspect of the Vacation Pay grievance, which the Board had dismissed in February 1994 (see LD 1261). Therefore, the Board had to decide what if any aspect of that grievance remained outstanding and appropriate for its consideration in the present instance.

Counsel's second objection dealt with the Board's jurisdiction to entertain the complaint regarding the SunLife grievance. Counsel argued that the SunLife grievance was not arbitrable and presumably not within the Board's jurisdiction pursuant to section 37 of the Code, as Mr. Shanks was seeking the application of section 32 of Quebec's Act Respecting Industrial Accidents and Occupational Diseases, R.S.Q., C-A 3.001 (the Act), for the recovery of his expenses rather than basing his rights of redress on the collective agreement.

#### IV - Evidence at the Hearing

##### The Complainant

During his testimony, Mr. Shanks relied on Mr. Dubois' status report of February 1994 to Mr. Dunster which is reproduced here in part:

*"Dear Dennis,*

*After a thorough verification I found all of Mr. Ron Shanks' grievances which you asked that I examine.*

...

*B-37-47-93 SunLife No answer from Paul McLeod.*

*B-38-47-93 Vacation Pay No answer from Paul McLeod..."*

Mr. Shanks had apparently found Mr. Dunster's request for copies of his grievances in February 1995 difficult to accept given Mr. Dubois' "thorough verification" of the grievances. He did not however produce any evidence that these grievances had been forwarded to Mr. Dunster in 1994. Under cross-examination, he explained that he had not waited to get a reply and had filed his complaint with the Board simultaneously with his last letter to Mr. Dunster because his experience to date had led him to believe that Mr. Dunster would not otherwise pursue the matter. He finally felt that "enough was enough."

Mr. Shanks also testified that in 1993, he had attempted to see Mr. Robert Dupuis, CANPAR's Regional Manager, about his medical claims, but had been escorted off the premises by the police for trespassing. He thought that the Union was well aware that he had been forcibly removed from the premises, but had nevertheless continued to do nothing to pursue his claims.

When asked about his interpretation of the Board's 1994 decision regarding part of the Vacation Pay grievance, he explained that he felt that it had not extinguished his right to claim both elements of that grievance namely the \$531.00 allegedly still owing, plus the \$10.00 a day penalty disallowed by the Union.

In addition to his own testimony, Mr. Shanks called one witness, Mr. Pichette, the Grievance Officer at CANPAR. Mr. Pichette testified that he had indeed seen Mr. Shanks escorted off the employer's premises but could not recall the specific date or time when this had occurred. He also testified to the effect that he had had a conversation with Mr. Dubois in 1992 when Mr. Dubois had told him that he would be closing Mr. Shanks' files. This was inexplicably never communicated to Mr. Shanks.

#### The Union

Mr. Dunster testified on behalf of the Union. He explained that 1993 was a year of considerable change both in the structuring of CANPAR and that of Union Executive. In fact, the record indicates that CANPAR Transport Limited had bought the assets of CANPAR, the former division of Canadian Pacific Express and Transport, in March 1993.

Mr. Dunster had been elected Executive Vice-President, TCU Trucking Division, in July 1993 and had officially taken office in September 1993, at the same time as Mr. Dubois who assumed the duties of Vice-President of the Trucking Division for Quebec. Prior to his assuming office, Mr. Dunster had been Local Chairman in Ottawa for nine years. He now had nationwide responsibilities and represented members from across the country. Mr. Dubois had been the former Local Chairman in Drummondville and as the newly elected full-time Vice-President was in charge of Quebec. At the time of his appointment as Vice-President, Mr. Dubois had taken over

from Mr. Marr who had written to Mr. McLeod in April 1993 regarding the two grievances at issue.

Mr. Dunster testified that at the time he had taken office in 1993, the Union Executive was downsized from seven to four full-time members and two part-time members, apparently without commensurate abatement in the Union's responsibilities or the number of grievances which had to be handled. Indeed, Mr. Dunster testified that in addition, the Union had been approached by Canadian Pacific in 1993 to negotiate an employee buy-out which apparently occupied him for some time thereafter.

Mr. Dunster explained that Mr. Dubois, having assumed office at the same time, was inexperienced and had no real training in union affairs. Indeed he felt that both he and Mr. Dubois were relatively inexperienced. Given the downsizing and turnover in the executive as well as the changes in the ownership of CANPAR, both had walked into what Mr. Dunster described as an "impossible" situation in the fall of 1993, with things in total disarray. Mr. Dunster further testified that he first heard from Mr. Shanks in January 1994 and that between January 1994 and February 1995, when Mr. Shanks contacted him a second time, he was too busy and did not attend to the two grievances at all other than to refer them to Mr. Dubois.

Even when Mr. Dubois sent him the status report in February 1994, Mr. Dunster was apparently still dealing with the employee buy-out and was unable to attend to the matter. No evidence was adduced as to how this buy-out related to the above-mentioned sale of CANPAR in 1993 or whether the buy-out continued to be an active preoccupation during the remainder of 1994 or, indeed, further into 1995.

Mr. Dunster testified that he did not have Mr. Shanks' files in his possession when Mr. Shanks telephoned him in February 1995, a year after his first call. When he made inquiries, Mr. Dubois apparently told him that he did not have the files either. However, "after a year of stating that he did not have the files," Mr. Dubois found

them and sent them on to Mr. Dunster in April 1995. Mr. Dunster explained that he looked briefly at the grievances at that time. Later, in May, he received copies of the grievances enclosed in Mr. Shanks' correspondence to him, Mr. Shanks having at the same time filed his complaint with the Board. Other than his brief review, Mr. Dunster did not indicate whether any further attention or consideration was given to the grievances following his receipt of them in April.

Under cross-examination, Mr. Dunster recalled that in February 1995, he had asked Mr. Shanks about his health and the probability of his return to work only to ascertain which of the current or former owner might be liable for Mr. Shanks' claim.

Referring to the delays and lack of communication with Mr. Dubois, Mr. Shanks asked Mr. Dunster whether in his view Mr. Dubois had not simply placed his grievances "in file 13," presumably meaning that Mr. Dubois would have closed or shelved them. Mr. Dunster responded that there has certainly been miscommunication with Mr. Dubois regarding the whereabouts of the files which Mr. Dunster candidly admitted were lost or mislaid. He believed that Mr. Shanks' grievances might have been in the closed files Mr. Dubois had inherited from Mr. Marr.

As to the status of the grievances, Mr. Dunster confirmed that in his view both grievances were technically still at step 3 of the grievance procedure as no response had been received from the company representative. To his knowledge, the grievances were never closed nor was Mr. Shanks ever told that they were.

With regard to the grievance procedure, Mr. Dunster explained that he would normally be involved in the decision to proceed to arbitration. The Vice-President was responsible for steps 1 and 2, and preparation for step 3 and arbitration. If arbitration was warranted, the Vice-President would put together a submission for decision by the Executive Vice-President, Mr. Dunster. In that regard, it was only at the hearing that Mr. Dunster explained that he would not have referred Mr. Shanks' grievances

to arbitration because, in his view, Mr. Shanks had received the full amount owing on his Vacation Pay grievance, and the SunLife grievance was not a matter arising out of the collective agreement and, as such, was not arbitrable. Having said that, he admitted that he was not pleased with the way the grievances had been handled. He would have preferred that the Union had closed the grievances in 1992 or 1993, advised Mr. Shanks accordingly and provided him with an opportunity to appeal the decision under the collective agreement.

When asked whether he was aware of the Board's decision of 1994 regarding the \$10.00 a day penalty requested as part of the original Vacation Pay grievance, he responded that he had only recently become aware of it, the decision having been sent to the attention of Mr. Boyce, the National President.

Mr. Dunster candidly acknowledged more than once that the grievances were not properly dealt with. As to his own and Mr. Dubois' conduct, Mr. Dunster admitted that the files had been mislaid, and that there has been miscommunication with Mr. Dubois at the local level and that Mr. Dubois lacked sufficient union training or experience. Having said that, he explained that the miscommunication and mislaying of the files were not deliberate and had occurred through inadvertence, without malice or bad faith. He and Mr. Dubois had been inexperienced two years ago, but they had learned a great deal since then.

## **V - Decision**

Three issues remain for our consideration:

(1) whether there is any matter outstanding for our determination regarding the Vacation Pay grievance following the Board decision of February 8, 1994;

(2) whether the Board has jurisdiction to entertain this complaint with regard to the SunLife grievance; and

(3) in the event that the answer to either of the above is affirmative, whether the Union breached its duty of fair representation in its handling of the two grievances at issue.

#### Scope of the Vacation Pay Grievance

As stated above, the Board rendered its decision regarding part of the 1992 Vacation Pay grievance in February 1994 and found no violation of section 37 of the Code. It found that the TCU, in deciding not to refer to arbitration Mr. Shanks' request for the payment of a \$10.00 a day penalty, had turned its mind to the merits of that portion of the grievance that had been referred to the Board. There being no duty to proceed to arbitration but simply to deal with the matter in a conscientious way, the Union was found not to have breached its duty.

The decision dealt only with the issue of the \$10.00 a day penalty. It did not deal with, and indeed the Board was not asked to deal with, the part of the grievance that was a claim of \$531.00 constituting the difference between the 8% Mr. Shanks had requested and the sum he had received. Indeed, the grievance at issue, which is still technically open at step 3, by virtue of Mr. Marr's letter to the employer representative in April 1993, dealt only with matter of the payment on the basis of 8% Mr. Shanks' gross annual income. Consequently, in our view, the instant review of the Union's conduct must be and is limited to its handling of the grievance as of that date, namely an account of the alleged underpayment of \$531.00. Thus we find ourselves properly seized of that complaint.

Arbitrability of the SunLife Grievance

We turn now to the second issue regarding the SunLife grievance, namely that Mr. Shanks' grievance is not arbitrable as it allegedly seeks to enforce rights arising out of a statute independent of the collective agreement. Accordingly, the Board would have no jurisdiction to consider Mr. Shanks' section 37 complaint, as the duty of fair representation arises solely in respect of rights under an applicable collective agreement.

As stated above, Mr. Shanks, in his correspondence to the Board and during the hearing, expressed the view that CANPAR was obligated at law to continue the health benefits of employees on disability as provided by section 32 of the Act. Article 32 reads as follows:

*"32. No employer may dismiss, suspend or transfer a worker or practice discrimination or take reprisals against him, or impose any other sanction upon him because he has suffered an employment injury or exercised his rights under this Act.*

*A worker who believes that he has been the victim of a sanction or action described in the first paragraph may, as he elects, resort to the grievance procedure set down in the collective agreement applicable to him or submit a complaint to the Commission in accordance with section 253."*

Article 235 of the same Act provides:

*"235. A worker who is absent from work as a result of an employment injury:*

*(1) continues to accumulate seniority within the meaning of the collective agreement that is applicable to him, and uninterrupted service within the meaning of the agreement and the Act respecting labour standards;*

*(2) continues to come under the retirement and insurance plans offered in the establishment, provided he pays his share of the exigible assessment, if any, in which case his employer shall assume his own share.*

*This section applies to the worker until the expiry of the time limit prescribed in subparagraph 1 or 2 of the first paragraph, as the case may be, of section 240."*

The question at issue however is not whether the Act applies to the facts at hand or whether Mr. Shanks may have an independent right of action against his employer arising out of that statute. It is also not for the Board to decide whether the Act may be enforced through arbitration. In this case, we must decide whether the Union breached its duty of fair representation with respect to Mr. Shanks, which duty, pursuant to section 37 of the Code, is owed exclusively in respect to his rights under an applicable collective agreement.

There was such a collective agreement in force when the grievance was filed. The SunLife grievance deals with the payment of health benefits during Mr. Shanks' period of disability. The amounts claimed by the complainant cover dental expenses. The applicable collective agreement provides for an employee dental plan as follows.

*"19.2 In accordance with the Agreement between the Company and TCU System Board 517, amendments thereto, a Dental Plan will apply to all participating employees whose names appear on the official Seniority List."*

Also, Appendix "B" of the collective agreement entitled "Excerpt from Supplemental Agreement Between the Company and the Organization Signatory Thereto" refers to sickness benefits, inter alia, in the case of accidental injury.

In the instant case, the payment of some dental benefits is clearly covered by the collective agreement. Having said that, it is not for the Board to decide the scope and

applicability of section 19.2 or Appendix "B" of the collective agreement. At the same time, we cannot conclude with certainty that Mr. Shanks' claim is not grounded in the applicable collective agreement and is therefore not arbitrable. Indeed, the Federal Court of Appeal has recognized that in cases of doubt "the relationship of the facts to the collective agreement is best determined by an arbitrator." (See Canadian Union of Public Employees, Airline Division v. Ashton and Time Air Inc. (1994), 170 N.R. 347 (F.C.A.).) Consequently, the Board determines that the Union's handling of the SunLife grievance can be the subject of a duty of fair representation complaint.

### The Merits

We will now consider the substantive issue in this complaint, namely whether the Union has violated its duty of fair representation.

It is useful at this juncture to examine the scope of the duty of fair representation in relation to the principles set out by the Supreme Court in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509:

*"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

*2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

*3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

*4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

*5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527)

The facts as they relate to the Union's conduct as of April 1993 have been extensively described and for the most part are not in dispute. Generally, the evidence before the Board is such that we accept Mr. Dunster's submission that the Union's conduct was without malice or bad faith vis-à-vis Mr. Shanks. Having said that however, we are of the view that this conduct fell short of meeting the requirement of the duty under the Code.

Mr. Dunster unequivocally admitted that the Union did not deal with the grievances in a proper manner or indeed in a manner consistent with its normal practice. He did say that it would have been preferable for the Union to close the grievances in 1992 or 1993. The fact remains however that as of April 1993, the Union saw fit to continue to pursue the grievances and it was Mr. Shanks' corresponding right to expect the Union to continue to conscientiously represent his interest in respect of those grievances to their settlement or conclusion, whatever the result. Indeed the issue is not whether the grievances have merit but rather whether the Union can be said to have given due consideration to the matter and thereby represented Mr. Shanks.

While Mr. Dunster spoke of the difficulties in communicating with Mr. Dubois and emphasized the relative inexperience of both, as well as the reduction in resources, he indicated, to excuse his own conduct, that he was otherwise occupied. It is however Mr. Dubois' conduct that is more problematic. The evidence does not allow

a clear determination of what Mr. Dubois knew of Mr. Shanks' circumstances or the whereabouts of various documents relating to his grievances during the two years in question.

His status report of February 1994 to Mr. Dunster, in which he refers to "the thorough verification" of the grievances, suggests an acquaintance with their substance. At the very least he distinguishes in that letter between grievances he believed to be closed and others that were awaiting a response from Mr. McLeod, were presumably not closed and therefore required further action. Mr. Shanks' letter of February 1994 to Mr. Dunster referred Mr. Dunster to specific provisions of the collective agreement which would have been triggered under the circumstances. He also advised Mr. Dubois in August 1994 of what he believed to be his rights pursuant to the collective agreement. We do not conclude that this placed an obligation on the Union to proceed to arbitration. Indeed it is trite law that Mr. Shanks did not have an absolute right to arbitration. In the circumstances of this case however, some action on the part of the Union was clearly required given that these grievances were not closed. If Mr. Dubois felt that more had to be done, he did not act. If, on the other hand, he thought that nothing further could be done, he apparently advised neither Mr. Dunster nor Mr. Shanks of that fact. Under the circumstances it is not clear what "union experience" either Mr. Dunster or Mr. Dubois would have required over and above what they possessed to understand that one way or the other, it was incumbent on the Union to act.

While Mr. Dunster did attempt to respond to Mr. Shanks, his was a rather feeble effort, apparently due to his other preoccupations. As to Mr. Dubois, it appears from the record and evidence that he did not act at all. Any action by the Union came uniquely in response to initiatives undertaken by Mr. Shanks either to ascertain the fate of his grievances or to have them settled. Indeed, allowing that Mr. Dubois did not know the whereabouts of the grievances, the fact that he took more than a year to find them in the records left behind by his predecessor shows a total lack of

diligence, especially in the light of Mr. Shanks' repeated request for information and action.

We cannot establish with certainty when Mr. Dubois finally found the grievances. We were told by Mr. Dunster that he received them in April 1995. However having finally located these, it appears that neither Mr. Dunster nor Mr. Dubois seriously set their minds to the merits of these grievances. Mr. Shanks had not heard from either of them by the time he had lodged his complaint in May 1995 nor to our knowledge thereafter.

The Union excuses its abandonment of the complainant's grievances by reference to mistake, inadvertence, and poor communication. Indeed in addition to the internal problems of communication between Mr. Dunster and Mr. Dubois, there was almost a total lack of communication with Mr. Shanks. There is in fact no evidence to indicate that either Mr. Dunster or Mr. Dubois ever communicated with Mr. Shanks on their own initiative, let alone in a timely manner.

The Board's jurisprudence establishes that failures in communication, while regrettable, are not in themselves determinative of a violation of the duty of fair representation unless it results in prejudice to the position of the grievor. Unions are by no means held to an absolute standard of representation and may, in good faith, make mistakes that do not necessarily constitute violations of section 37. As to Mr. Dunster's admission regarding the Union's handling of these grievances, it is not in itself conclusive of a breach of the duty and must be considered in the context of all of the circumstances of the case.

Having considered the whole of the circumstances, the Board concludes that the Union has transgressed the acceptable boundaries of simple error or failure of communication. The failures in communication, be it between Messrs. Dubois and Dunster or with Mr. Shanks, did prejudice Mr. Shanks' position. He had a right to

the diligent pursuit of his claim and interest; at the very least, he was entitled to closure. That being said, the central issue here is by no means simply poor communication but rather one of sustained neglect and inaction on the part of the Union in the exercise of its exclusive authority. However caused, the loss of the files as well as the inaction of the Union in pursuing the grievances indicated a casualness and lack of diligence amounting to indifference.

Nor can one argue that the Union showed diligence commensurate with the importance of the grievances as the evidence indicates an almost total absence of responsiveness, especially at the local level. It would appear that Mr. Shanks' grievances did indeed go "into limbo" and were kept there for close to two years by neglect and inattention. We were led to conclude that during this period the Union's conduct resulted in an absence of representation, which we find in the circumstances constitutes serious or major negligence. Given the course of conduct of Messrs. Dunster and Dubois, there is reason to suppose that neither might have seriously given further consideration to these grievances had Mr. Shanks not filed his complaint with the Board.

Therefore, we conclude that the Union did not turn a diligent and genuine mind to the grievances, was seriously negligent in its representation of Mr. Shanks and failed to meet the standard of care stipulated in Canadian Merchant Service Guild et al. v. Guy Gagnon, supra. Through its lengthy neglect, inaction and inattention to Mr. Shanks' grievances, the Union has acted in a superficial, perfunctory and arbitrary manner and has breached its duty of fair representation.

On the basis of this finding, the Board will retain jurisdiction to order a remedy pursuant to section 20 of the Code. The Board therefore requires the Union and the Employer to file their complete written representations in that regard no later than

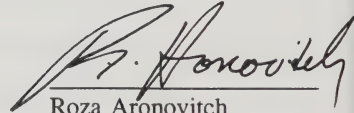
July 8, 1996 in order to address the issue of fashioning an appropriate remedy pursuant to section 99 of the Code in the present circumstances. The complainant will then have ten (10) days to respond.



Jean L. Guilbeault, Q.C./c.r.  
Vice-Chair



Véronique L. Marleau  
Member



Roza Aronovitch  
Member

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## Summary

Ronald Clavet, *employee*, VIA Rail Canada Inc., *employer*, and Pierre Guénette, *interested parties*.

Board File: 950-320  
CCRT/CLRB Decision no. 1158  
April 29, 1996

Referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code, Part II.

Safety of employees - Referral of safety officer's report - An electrician at VIA Rail refused to work with the shore power system at the Ottawa train station when he discovered that the system was not fail safe.

The safety officer's finding of absence of danger was overturned. The Board concluded that, at the time of the officer's investigation, the ground fault protection mechanism of the electrical system was faulty and that the situation constituted a danger for the purposes of the Code. A hidden defect affected a fundamental aspect of the ground fault protection mechanism of the electrical system, thereby rendering its use dangerous.

Despite the finding of absence of danger, the safety officer approached the employer in order to have the situation rectified. VIA Rail having already stopped upon its own initiative the employees from using the system following these events, agreed to remedy the situation. At the hearing, it was established that the required modifications were almost completed. In the circumstances, in order to

## Résumé

Ronald Clavet, *employé*, VIA Rail Canada Inc., *employeur*, et Pierre Guénette, *partie intéressée*.

Dossier du Conseil: 950-320  
CCRT/CLRB Décision n° 1158  
le 29 avril 1996

Renvoi de la décision d'un agent de sécurité conformément au paragraphe 129(5) du Code canadien du travail, Partie II.

Sécurité du personnel - Renvoi du rapport d'un agent de sécurité - Un électricien de VIA Rail a refusé de travailler avec le système d'alimentation de quai à la gare d'Ottawa lorsqu'il a découvert que ce système n'était pas sécuritaire en cas de défaillance.

La décision d'absence de danger de l'agent de sécurité est infirmée. Le Conseil conclut que, au moment de l'enquête de l'agent, le dispositif de protection contre les défaillances du système électrique était lui même défaillant et que cette situation constituait un danger au sens du Code. Un vice caché affectait un aspect fondamental des mécanismes de protection du système électrique et ce vice rendait dangereuse l'utilisation du système.

Malgré sa conclusion d'absence de danger, l'agent de sécurité a entrepris des démarches auprès de l'employeur pour qu'il rectifie la situation, ce que VIA Rail a accepté de faire, ayant de son propre chef déjà fait cesser toute utilisation du système à la suite de ces événements. Au moment de l'audience, il a été établi que ces modifications étaient pratiquement complétées. Dans ces conditions,



eliminate the dangerous situation, the Board deemed it appropriate to adopt as its own the conditions of the employer's voluntary agreement as directions pursuant to section 130(1)(b) of the Code.

le Conseil juge qu'il convient de faire siennes les modalités de la promesse d'engagement volontaire contractée par l'employeur pour valoir à titre d'instructions aux termes de l'alinéa 130(1)b) du Code afin d'éliminer cette situation dangereuse.

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## Reasons for decision

Ronald Clavet,

*employee,*

*and*

VIA Rail Canada Inc.,

*employer,*

*and*

Pierre Guénette,

*interested party.*

Board File: 950-320

CCRT/CLRB Decision n° 1158

April 29, 1996

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The Board was composed of Ms. Véronique L. Marleau sitting as a single member, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held in Ottawa on December 4 and 5, 1995.

### Appearances

Mr. Ronald Clavet, assisted by Mr. Gaétan Auger, electrician, for the complainant;  
Mr. John-Nicolas Morello, Senior Counsel, assisted by Mr. W.C. (Bill) McGregor,  
Line foreman, for the employer;

Mr. Pierre Guénette, Safety Officer, assisted by Mr. Ian M. McAllister, professional  
engineer, for the interested party.

The Board has before it the referral, pursuant to section 129(5) of the Canada Labour Code, of a safety officer's decision that there was no danger within the meaning of the Code in the circumstances of the present case:

*"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

In his letter advising the Board of the above-mentioned referral, the safety officer raised the question of the timeliness under the Code. At the hearing, the applicant established to the Board's satisfaction that he had in fact filed his request within the prescribed time limit. No other preliminary question was raised.

# I

The safety problem at issue relates to the operation of panels 1 and 2 of the shore power station at the Ottawa train station. Trains that are in the station can be energized by connecting them to a shore power station instead of using a locomotive, an arrangement that permits fuel savings. At the Ottawa station, a train that is connected in this manner using heavy-duty cables is fed by a 480 V electrical current. This circuit is completed by a 120 V ground fault protection system that operates in tandem to protect all the internal circuits of the electrical system, should a component of the circuits fail. For example, if a fuse blows or a cable is damaged and causes a short circuit in the electrical system, the 120 V circuit is activated and automatically turns off the current in the 480 V circuit. In addition to the yellow light indicating that the system is about to be activated, the control panel of the electrical system also has three separately fed red lights (the current is distributed between three phases of the circuit) which, when on, indicate that there is current in the 480 V circuit.

## II

The applicant, Ronald Clavet, works for VIA Rail Canada Inc. (VIA Rail) as an electrician. On July 2, 1995, he had to connect a train to the shore power station at the Ottawa station. While performing this operation, at approximately 8:35 p.m., he determined that a danger existed because, in his opinion, a defect in the electrical system was preventing its safe operation. He availed himself of the procedure set out in the Code and refused to work.

This refusal was related to an event that had occurred the previous day when another VIA Rail electrician, Mr. Gaétan Auger, had refused to work. On July 1, 1995, Mr. Auger was scheduled to perform the connecting operation. The fuse of the 120 V circuit (protective mechanism) blew. According to Mr. Auger, it was undoubtedly the arrival of a second train at the station that had caused the fuse to blow. When he attempted to disconnect the cable from the train, M. Auger saw that he was unable to turn off the current in the usual manner. He opened the panel and turned off the the current by pushing the circuit breaker. He noticed that when the fuse of the 120 V circuit had blown, the yellow light went out, but that the current kept flowing. He also noticed that the electrical current could not be turned off using the control button and the ignition key. He tried to turn off the current by pushing the button on the panel, but this had no effect: he did not hear the sound of the circuit breaker, and the red lights were still on. This indicated that the 480 V current was still flowing even though he was trying to turn it off by the usual method.

In this type of situation, the only way of determining if the current was still flowing was to see whether the three red lights of the electrical panel were on. To turn off the current, it was necessary to open the electrical panel's access door and press the control button. However, the electrical panel was always locked and only the electrician on duty had the key. This situation did not therefore allow a quick response

in an emergency: given the complexity of the procedure for turning off the electrical current, the response time might be too long to prevent an accident.

Mr. Auger concluded that if the protective system became inoperative, the electrician was completely unprotected. Because of the apprehended danger, he exercised his right to refuse to work. Mr. Auger had the following to say in this regard: *"Unbeknownst to us, we no longer had control of our equipment. In addition, what was supposed to be fail-safe was not operating either. The three red lights were enough to tell me that there was current, but that's no way to turn off the current. The system must be self-sufficient."* (translation)

Mr. Auger called his foreman, Mr. McGregor, to inform him of the problem. He told Mr. McGregor that the system was not in the least safe. After replacing the fuse, they tested the system and determined that it was operating normally. Mr. Auger then told Mr. McGregor that he no longer wanted to use the system because he did not feel safe since the fuse had blown. Mr. McGregor told Mr. Auger that if he wanted to refuse to work, he had to do so under the Canada Labour Code because the use of an electrical system and the hazards associated with the operation of this system were inherent in an electrician's work. Mr. Auger invoked the Code.

Following Mr. Auger's refusal to work on July 1, 1995, Mr. Pierre Guénette, a safety officer, was dispatched to the work site. Mr. Auger then explained the problem to Mr. Guénette. However, since the blown fuse had been replaced and since the system indicated that it was operating normally, Mr. Guénette concluded that there was no danger within the meaning of the Code.

Mr. Auger agreed to resume work on condition that all affected employees be informed of the safety hazard posed by the operation of the electrical system, i.e., that in the event of a malfunction of the protective mechanism (120 V circuit), they would have no protection whatsoever because the consequences and seriousness of this

malfunction could not be assessed. Mr. McGregor agreed to warn Mr. Auger's fellow workers, which he did by speaking to all employees at the end of their shift and giving them a copy of the following notice dated July 1, 1995:

*"TO: All Equipment Department Employees, Ottawa*

*When you are operating the Shore Power unit, please make sure that you are getting proper light indications on the control panel before connecting or disconnecting the 480 Volt cables.*

*Signed: W.C. McGregor"*

Mr. Auger also stated that he agreed to resume work because his employer now knew that he was no longer protected by the system. In his opinion, what was important was that the problem be solved. Mr. Auger explained to the Board that he did not request that this decision be referred to the Board because Mr. Guénette had agreed to refer the matter to his expert.

Mr. McGregor, for his part, stated that prior to this incident, no one knew that the protective system became inoperative when the control transformer fuse blew. However, he pointed out that the employees had been told to always check the control panel's red lights because they clearly indicated that there was current. According to Mr. McGregor, this was sufficient to ensure the employees' safety, because if a problem arose, the electrical current could always be turned off using the control button located inside the control panel.

### III

These are the circumstances in which Mr. Clavet exercised his right to refuse to work on July 2, 1995. Following the previous day's events, Mr. Clavet had learned that the ground fault protective system became inoperative when the transformer fuse blew. Like Mr. Auger, Mr. Clavet concluded that if the protective system became

inoperative, the electrician was left completely unprotected. As the system had not been modified since the discovery of the operating defect and because this defect could render the protective mechanism inoperative during regular use, Mr. Clavet, given the identified danger, decided to exercise his right to refuse to work and to continue to refuse to work until the modification was made.

Mr. Clavet, who had almost lost his life to an electrocution in 1990 at the Montréal station, explained to the Board that he had exercised his right to refuse and then had required that the decision of no-danger be referred to the Board because the previous day's situation clearly demonstrated that there was still a danger and he did not want the situation that he had experienced to be repeated. He did not want his fellow workers to have an accident like the one he had suffered.

Safety officer Pierre Guénette again visited the work site and reached the same conclusion he had reached the previous day. According to him, there was no danger within the meaning of the Code: the blown fuse had been changed and the electrical system was operating normally. Messrs. Clavet and Auger (who was also present) then removed the fuse to show Mr. Guénette the nature of the defect: this meant that the circuit was no longer fail-safe because the protective system was inoperative. The three red lights remained on, indicating that there was still current, whereas in this type of situation, one should expect that the current be turned off automatically. In this regard, Mr. Guénette told the Board that while he believed that there was no danger within the meaning of the Code, he acknowledged that there was in fact a problem. On July 5, 1995, he confirmed in writing his July 2 decision, which reads as follows:

### ***"III. DECISION OF THE SAFETY OFFICER***

*After completion of the investigation, it was decided that the situation was normal. Therefore no danger was identified on the circumstances prevailing at the time of the investigation. A Labour Affairs Officer can not [sic] base his decision on a potential danger.*

*Following my decision of no danger a meeting will be planed [sic] between Bill McGregor, Gaétan Auger, John Norton, Rondar Inc., an industrial safety engineer from Labour Program - Technical Services Division and myself, to inspect the shore power station and to identify some possible problems with the system in place."*

It is that decision that is the subject of the present referral pursuant to section 129(5) of the Code.

#### IV

Having agreed to return to the work place to see what should be done to solve the "problem", Mr. Guénette approached Mr. Ian M. McAllister, a professional engineer, to ask him to act as expert. A meeting was held at VIA Rail on July 5, 1995 in order to assess the situation and identify the problem. Messrs. McAllister and Guénette then met with the parties. Mr. Auger (Mr. Clavet was unfortunately absent) removed the fuse again to show that the system was defective.

Mr. McAllister explained to the Board that, based on his own observations, he had supported Mr. Guénette's position. According to him, there was indeed a "problem", but no "danger" within the meaning of the Code, because the current could always be turned off using the appropriate key. In his report to the safety officer of July 20, 1995, Mr. McAllister had, however, expressed some major reservations:

*"The electrician while investigating a complaint about the functioning of the control panel observed that while the control panel energized lamp was off that the 480 V phase indicators were all on. Upon investigation he concluded that a blown fuse in a 120 V control circuit was the cause of the energized lamp being off. This control circuit is the means of supplying power to the circuit breaker opening coil, that is, without power from this circuit it is not possible to deenergize the circuit breaker. This failure of a control circuit component while allowing the phase lines to be energized did not constitute a fail safe circuit."*

*The system was reset by manually tripping the circuit breaker, and installing a functional fuse.*

*While the circuit could be considered satisfactory respecting safety, it does require strict observance of the lamps to guard against connecting the trailing cables while they are energized with 480 V.*

*In this case strict observance by the persons involved eliminated the possibility of an accident occurring while connecting the trailing cables. The laws of chance dictate that the next time the same thing happens the operators might not be so lucky.*

*For the system to function in a fail safe mode there must always be power to operate the circuit breaker opening coil. Some form of low voltage detection circuit would be required to upgrade the control panel to the minimum acceptable safety levels."*

(emphasis added)

At the hearing, Mr. McAllister admitted that he had drawn these conclusions based on his belief that the only persons who could access the system were the electricians who, because of the nature of their work, must know the safety procedures and rules relating to the operation of a shore power unit. He admitted that in concluding that there was no danger, provided that the procedure governing the safe operation of the system was strictly observed, he had not considered the fact that other persons, such as the carmen, could be required to handle the cables or other components of the electrical system and that these carmen did not necessarily have access to the panel indicating that the red lights were on.

Moreover, Mr. Greg Guitard, head of operations, explained to the Board that there were two shore power systems at the Ottawa station. Both operated in a similar fashion, but differed in a number of respects in terms of control. For example, while the system of panels 1 and 2 remained energized if a fuse blew, the power to the system of panel 3, which was newer, was turned off immediately. Mr. Guitard stated that when he was told of these differences at the July 5, 1995 meeting, he had decided that it would be better if the systems were standardized because the same employees

were required to work on all the systems. Clearly, as Mr. Auger pointed out at the meeting, an employee could confuse the two systems and use the wrong procedure in case of a malfunction. He stated that *"that potential created a risk that had to be removed."*

Although he also said that he believed that this risk did not constitute a "danger," Mr. Guitard nevertheless ordered that no one use the system of panels 1 and 2 until the protective mechanism was modified in accordance with the specifications for the system of panel 3. The system of panels 1 and 2 have not been in operation since.

Following the meeting held at VIA Rail on July 5, 1995, Mr. Guénette gave Mr. McGregor of VIA Rail an assurance of voluntary compliance form whereby VIA Rail agreed to make modifications to the system. On July 17, 1995, Mr. McGregor signed the form which provided that the planned corrective action had to be completed in October, a deadline which was postponed for a variety of technical reasons.

The assurance of voluntary compliance given by VIA Rail on October 13, 1995 essentially restates Mr. Guitard's decision to stop using panels 1 and 2 of the shore power system at the Ottawa station until the system was modified in accordance with the recommendations to make it fail-safe:

*"The design of the Shore Power Station will be modified.*

*Shore Power System on track # 1 and 2 East are out of service and not to be used until recommendations are received from the consultant and implemented."*

On July 11, 1995, Mr. McGregor made similar comments on the VIA Rail notice of danger form, which was completed following Mr. Clavet's refusal to work on July 2, 1995:

*"There will be a modification made to the system on Track # 1 & 2 East to bring the system to the standard of system on Track # 1 West. "*

Subsequently, Mr. Guénette kept in touch with Mr. McGregor to follow the progress of the modifications designed to make the system fail-safe.

Mr. Clavet, who did not wish to say if these modifications were sufficient, did not, however, try to establish that they would not solve the problem to everyone's satisfaction. Nor did he ask the Board to give, with respect to the power system in question, specific directions to ensure its safe operation. Mr. Clavet's stated objective in requesting the referral of Mr. Guénette's decision to the Board was to have the "problem" declared a danger within the meaning of the Code, so that once and for all everyone would stop minimizing its implications for the employees concerned.

## V

The right to refuse to work and the procedure to be followed when employees wish to exercise this right are set out in sections 128 et 129 of the Code. The relevant provisions read as follows:

*"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that*

*(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*

*(b) a condition exists in any place that constitutes a danger to the employee,*

*the employee may refuse to use or operate the machine or thing or to work in that place.*

*(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where*

*(a) the refusal puts the life, health or safety of another person directly in danger; or*

*(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment.*

...

*(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee...*

...

*(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that*

*(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or*

*(b) a condition continues to exist in the place that constitutes a danger to the employee, the employee may continue to refuse to use or operate the machine or thing or to work in that place.*

*129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.*

*(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not*

*(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or*

*(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),*

*and he shall forthwith notify the employer and the employee of his decision."*

The Board's mandate regarding the referral of a safety officer's decision, pursuant to section 129(5) of the Code, is set out in section 130(1):

*"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*

*(a) confirm the decision; or*

*(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."*

In that particular context, the Board's role is limited to examining the "circumstances of" and "the reasons for" the safety officer's no-danger decision in order to reconsider the decision or confirm it, as the case may be. Therefore, the question the Board must answer in the present case is the following: was the safety officer justified in concluding, at the time of his investigation, that no danger existed? (See Bidulka v. Canada (Treasury Board), [1987] 3 F.C. 630; Canada (Attorney General) v. Bonfa (1989), 73 D.L.R. (4th) 364; and 113 N.R. 224 (F.C.A.); and Stephen Brailsford (1992), 87 di 98 (CLRB no. 921), page 107.)

## VI

The present case involves the notion of danger provided for in the Code. Specifically, the basic question raised deals with the characterization of the problem observed by the safety officer during his investigation, i.e., the system's inability to operate in a fail-safe manner. In his decision, the safety officer stated that a potential danger could not justify a decision that there was a danger within the meaning of the Code. What exactly is the situation? Did the problem identified on July 1, 1995 merely constitute a "systems problem" requiring special attention or did it also constitute, having regard to its nature, a "danger" within the meaning of the Code?

The notion of danger under the Code is defined as follows in section 122(1):

*"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."*

The Board has repeatedly held that in order to comply with the definition in the Code, the danger must be immediate and real. In other words, the risk to the employee must be so serious that the work must stop until the situation is corrected, i.e., until the source or cause of the danger is eliminated. The urgency is implicit in that the Code's definition of the word "danger" covers *"any condition that could reasonably be expected to cause injury or illness before it can be corrected"* (according to Labour Canada's definition of danger adopted by the Board in its decisions: see for example Alan Miller (1980), 39 di 93; [1980] 2 Can LRBR 344; and 80 CLLC 16,048 (CLRB no. 243), pages 104; 353; and 754; Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); Pierre Guénette (1988), 74 di 93 (CLRB no. 696); and David Pratt (1988), 73 di 218; et 1 CLRBR (2d) 310 (CLRB no. 686), pages 223-224; and 315-316). This means that the hazard must not result from the employee's personal situation. Moreover, it must be a danger that, according to Parliament, must be covered by Part II of the Code. Consequently, this excludes a danger arising from a hazardous

condition that is inherent in the employee's work or is a normal condition of work (section 128(2)(b): see by analogy Gilles Lambert (1989), 78 di 69 (CLRB no. 748), page 79).

This interpretation, moreover, is consistent with the spirit and purpose of the right to refuse which is described as an "*an emergency measure to deal with dangerous situations which crop up unexpectedly*" (David Pratt, *supra*, pages 226; and 318), and not the principal mechanism for achieving the objectives of Part II of the Code or as a "last resort" to force a decision on existing disputes or to settle long-standing disputes (William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357); David Pratt, *supra*; and Stephen Brailsford (1992), 87 di 98 (CLRB no. 921)).

According to the safety officer, the danger alleged by Mr. Clavet did not meet those criteria at the time of his investigation because the shore power system was operating normally. Mr. Guénette believed that there clearly was a hazard resulting from the defective operation of the fail-safe protective mechanism. However, this hazard did not create an immediate danger, but a systems problem that had to be solved. In support of that interpretation, Mr. McAllister, for his part, told the Board that the protective mechanism was designed to protect equipment and not individuals. Consequently, he believed he could not conclude that a malfunction of this mechanism could create a condition that constituted a danger to individuals. With all due respect, we cannot accept this reasoning.

It is by ensuring that equipment is operating properly that we protect individuals. If the main purpose of the mechanism is to protect the equipment, ultimately it is so that this equipment can protect persons who must use it. In the present case, the fail-safe mechanism was itself defective or "fail-unsafe". A discovery was made: a simple equipment malfunction which likely resulted from both internal and external factors (a condition that cannot be detected) was sufficient to render it inoperative. Instead

of fulfilling its normal function, i.e., automatically turning off the current in the event of a defect in the system, the protective mechanism (120 V circuit) became inoperative when it was supposed to be activated. Consequently, this was no longer a fail-safe circuit.

In Alan Miller, supra, the Board said the following concerning the standard of judgment that it must apply in deciding whether or not a danger exists:

*"The nature of the safety officer's decision and the legal consequences which flow from it as described above illustrate clearly that the standard of judgment on the question of whether or not imminent danger exists shifts, at this stage, to one which is more objective than the reasonable cause for belief permitted the refusing employee during the initial and investigative stages in section 82.1."*

(pages 101; 350; and 752)

Having regard to the more objective criterion in the present case, we find that the evidence does not support the conclusion reached by the safety officer. In the Board's view, at the time of the July 2, 1995 investigation, there was in fact a real and immediate danger, i.e., a condition that threatened the safety of the employee and exposed him to hazards not inherent in his work.

As we pointed out, panels 1 and 2 of the 480 V power system were equipped with a "fail-safe" protective system that was "fail-unsafe". The existence of a hidden defect affecting a basic aspect of the system's protective mechanisms constituted, in our opinion, a *"hazard or condition that could reasonably be expected to cause injury... to a person exposed thereto before the hazard or condition can be corrected,"* and hence, a danger within the meaning of the Code (section 122), because this hazard, given its nature, could arise at any time and this condition could cause an accident before it could be corrected. Employees required to work with this system could not anticipate the occurrence of such failures and could no longer rely on the protective

mechanism to operate normally. In the circumstances, if it were acceptable to rely temporarily on the three red lights (the mechanism indicating that there was power), all persons affected having been informed of the danger and the need for strict observance once the existence of the hidden defect had been detected (as Mr. Auger had agreed to do on July 1, 1995 in order to complete the manoeuvre and shut down the system), such was not the case subsequently. In our opinion, as soon as the defect of the protective system for the 480 V power system had been detected, the electricians, carmen and anyone else should no longer have been exposed to it and hence required to continue using this system until the problem had been corrected.

This dangerous situation existed at the time of the safety officer's second investigation on July 2, 1995; it is not contested that it was known at the time that a hidden defect was affecting the protective mechanism, making it unsuited to its intended purpose, i.e., to ensure the safe operation of the electrical system. The refusal to work was based on the fear that the protective system would not operate should a malfunction of the main system occur, and this fear was founded.

Counsel for the employer argued that Mr. Clavet's concerns regarding the safety of the electrical system involved a systems problem, in the sense that this malfunction was not an immediate danger, but rather a systems operation problem. He argued that in such cases, the Board had previously held that the appropriate solution was found in other provisions of Part II of the Code that encourage the use of joint efforts to resolve occupational health and safety issues. He relied on Ed Koski et al. (1993), 92 di 195; and 21 CLRBR (2d) 306 (CLRB no. 1030); Gerald Day (1994), 93 di 150 (CLRB no. 1048); and A. Patrick Gilmore (1994), 96 di 61 (CLRB no. 1096), where the Board confirmed no-danger decisions, after concluding that the refusals to work had occurred in the context of a systems hazard as opposed to ad hoc or immediate danger.

In Ed Koski et al., supra, two carmen had refused to do "hot work" in connection with the repair of railway cars because they were concerned about the level of PCB contamination of painted surfaces on certain locomotives and cars. The employer was aware of the health hazards involved and had put in place interim protective measures. Upon referral of the safety officer's no-danger decision, the Board confirmed the decision, finding that the complainants had exercised their right to refuse to work in order to force a settlement of the problems they perceived regarding the concentration of hazardous substances present in their work place and the protective measures that should be taken to address the potential health hazard.

In A. Patrick Gilmore, supra, a yardmaster had refused to work because the radio communication system used to control train movements was inadequate. The Board confirmed the safety officer's decision that there was no danger within the meaning of the Code, because it found that even if the inadequate radio communication system could increase somewhat the risks of dangerous situations, train movements and other yard activities were governed by rules designed to ensure safe operation. There was nothing to suggest that employees were not aware of these rules or that the rules had not been properly enforced.

In Gerald Day, supra, a carman employed at CN Rail's GO Rail yard had refused an assignment he considered dangerous because he believed he was not adequately protected. His concern stemmed from an incident the previous night where the safety rules, known as the "blue flag" system, had been breached by another employee while he was doing work on a car. The blue flag system consists of rules that, if respected, ensure the safety of employees doing maintenance work on tracks. In the absence of evidence that the rules were not enforced and observed, the Board confirmed the decision that there was no danger within the meaning of the Code.

In that case, the complainant had stated that he no longer trusted the system. The Board addressed this concern as follows:

*"... If indeed the system were one in which employees could not reasonably have confidence - that is, if it were simply a 'paper system' which was not rigorously followed and enforced - then it could not be said to guarantee workers' safety. The Board would then conclude that work on a track such as this constituted a danger to employees, who would be entitled to refuse such work. In the instant case, however, while Mr. Day was understandably upset and properly concerned about the failure of the system which had occurred on October 4, it cannot reasonably be concluded from that violation of the system - which the company at once investigated, and in respect of which it imposed discipline - that the system was itself unreliable. It may be noted that the company offered Mr. Day his own lock and key for the switch, which would have given him personal control over any train movement on the track, but he refused that suggestion."*

(Gerald Day, *supra*, pages 152-153; emphasis added)

In the present case, it is true that like the facts of the above cases, the situation involved a systems problem to the extent that the alleged danger stemmed from the employee's belief that he was not adequately protected while working on the shore power system. However, what distinguishes the present case from the above cases is that even if the rules governing use of the system were followed, there were serious reasons to believe that these rules would not necessarily protect the employees who had to use the system because it was not reliable since its internal protective mechanisms were defective. In the circumstances, Mr. Clavet's loss of confidence in the system was legitimate.

The alleged danger in the present case, which stemmed from the hazards associated with the possibility that the fuse of the 120 V circuit would blow again while the 480 V shore power system was energized, was immediate and real because the condition could arise at any time and without warning. In fact, it was established that there was no way of telling when the fuse in the control transformer would blow again. Moreover, as Mr. Guitard pointed out, panels 1 and 2 operated differently from panel 3, which posed the added risk of an employee's confusing the two systems and

following the wrong procedure in case of a malfunction. Given the differences between the systems, it was by no means certain that the correct procedure would be followed. The three red lights are merely a warning signal to indicate the presence of electrical current; however, in and of themselves these lights do not protect employees, nor do they allow employees to turn off the current. In this regard, it is worthy of note that at the hearing, Mr. McAllister acknowledged that the device "*was not up to standard.*" Moreover, unlike the situation that existed in A. Patrick Gilmore and Gerald Day, *supra*, even if the proper procedure was followed, there was a risk of a very serious, indeed fatal, accident because the protective system had a hidden defect that made it unsuited to its purpose.

Furthermore, given the number of people likely to come in contact with the electrical power system, it could not reasonably be expected that they would all know the procedure to follow in case of a malfunction. As Mr. McGregor acknowledged, certain tasks associated with the operation of the electrical system are no longer performed exclusively by electricians. These tasks, such as connecting and disconnecting electric cables, are sometimes performed by carmen. However, the carmen do not necessarily check the lights on the electrical panel before performing their duties. Moreover, unlike the electrician on duty, they have no key to access the control panel of the electrical system should the protective mechanism activated by the 120 V circuit malfunction. In addition, it was established that, at the time of the safety officer's investigation, passengers had to walk near the electric cables connected to the train.

These are the concerns that led Mr. Clavet to invoke the provisions of the Code. Considering these factors, the Board believes that this situation posed a real danger that was both permanent and immediate, and that this danger was not inherent in the work of an electrician. There was a danger within the meaning of the Code when safety officer Pierre Guénette conducted his investigation on July 2, 1995, because the system contained at the time a defective mechanism, which made this mechanism

unsuited to its purpose. For all these reasons, the Board rescinds the safety officer's decision.

## VII

In this type of situation, the Board, pursuant to section 130(1)(b) of the Code, must give the directions it deems appropriate in respect of the machine or thing whose use poses a danger. In the present case, despite his no-danger finding, the safety officer approached the employer, asking it to correct the situation, and the employer agreed to do so. The employer undertook on its own initiative to modify the system to make it fail-safe. Moreover, it was established that at the date of the hearing, the modifications had almost been completed and that, in the meantime, the system would remain shut down. Clearly, VIA Rail's approach was most responsible. It acted quickly on the concerns expressed, having since the July 5, 1995 meeting issued instructions to discontinue use of the system until the hazard has been eliminated.

M. Clavet did not wish to say if these modifications were sufficient. His actions were designed primarily to make his employer aware of the dangers that the electrical system posed and to have the Board declare that there was indeed a danger despite the findings of the safety officer and his employer. Even if the modifications to the electrical system would in all likelihood enable Messrs. Clavet and Auger to meet their objective, Mr. Clavet nevertheless insisted that the safety officer's decision be referred to the Board. The condition that existed when Mr. Guénette conducted his investigation changed completely as soon as the system of panels 1 and 2 was shut down until it is modified to make it fail-safe. Unquestionably, from that point on, there was no longer a danger. Parliament's intent in enacting sections 128 and 129 of the Code, i.e., to ensure that people are not exposed to a danger within the meaning of the Code, has therefore been fulfilled (see in this regard Dennis C. Atkinson (1992), 89 di 76 (CLRB no. 958)).

In the circumstances, and all things considered, the Board finds that the directions it should give in the present case correspond to the employer's undertaking. It therefore endorses the terms and conditions of the assurance of voluntary compliance given by VIA Rail to eliminate this dangerous situation as directions under section 130(1)b) of the Code. The Board retains jurisdiction until such time it receives VIA Rail's confirmation that the work to modify the shore power system, in accordance with the consultant's recommendations and the requirements of the competent authorities, has been completed.



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Véronique L. Marleau  
Member of the Board



# Information

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## Summary

Antonia Di Palma, *complainant*, and Air Canada, *respondent*.

## Résumé

Antonia Di Palma, *plaignante*, et Air Canada, *intimée*.

Board File: 950-302  
CLRB/CCRT Decision no. 1159  
May 2, 1996.



Dossier du Conseil: 950-302  
CLRB/CCRT Décision n° 1159  
le 2 mai 1996

Complaint pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health), alleging violation of section 147 of the Code.

Plainte en vertu du paragraphe 133(1) du Code canadien du travail (Partie II - Sécurité et Santé au travail), alléguant violation de l'article 147 du Code.

The complainant was a flight attendant with Air Canada. During a Toronto-Montréal flight, she exercised her rights under the Code and refused to work because she felt that there was not enough air in the aircraft and that the environment was dangerous to her health. She alleged that at the meeting during which the safety officer ruled verbally that there was no danger, the employer's legal counsel had threatened her that disciplinary action could be taken against her.

La plaignante était agent de bord au service d'Air Canada. Lors d'un vol Toronto-Montréal, elle s'est prévalu des dispositions du Code et a refusé de travailler au motif que l'environnement était dangereux pour sa santé parce qu'il n'y avait pas, selon elle, suffisamment d'air dans l'avion. Elle allègue que lors de la réunion au cours de laquelle l'agent de sécurité a conclu à l'absence de danger, le procureur d'Air Canada l'a menacée en évoquant la possibilité que des mesures disciplinaires soient prises contre elle.

The complaint was dismissed. Nothing in the evidence supported such a claim. The employer proved that it had never intended to threaten the complainant or attempted to put pressure on the employee. It simply provided information.

La plainte est rejetée. Rien dans la preuve ne soutient une telle allégation. L'employeur a prouvé qu'il n'avait jamais voulu menacer la plaignante ni faire pression sur elle. Il a simplement fourni des renseignements.

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## Reasons for decision

Antonia Di Palma,

*complainant,*

*and*

Air Canada,

*respondent.*

Board File: 950-302

CLRB/CCRT Decision no. 1159

May 2, 1996

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The Board was composed of Mr. J. Philippe Morneault, Vice-Chair, and Ms. Véronique L. Marleau and Ms. Roza Aronovitch, Members. A hearing was held on December 14 and 15, 1995, at Montréal.

### Appearances

Mr. Colin Lambert, National Director, CUPE (Health & Safety Dept.), accompanied by Mr. Anthony Pizzino, CUPE (Health and Safety), for the complainant; and Mr. Guy Delisle, Senior Solicitor - Employment Law, accompanied by Ms. Louise-Hélène Sénécal, Regional Attorney and Trademarks Agent, for the respondent.

These reasons for decision were written by Ms. Véronique L. Marleau, Member.

### I

On March 2, 1995, Ms. Antonia Di Palma filed a complaint with the Board pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health), alleging that her employer, Air Canada, had contravened section 147 of the Code. According to Ms. Di Palma, at an investigation meeting held on December 3, 1994, concerning her refusal to work during a Toronto-Montréal flight on September

9, 1994, an Air Canada representative had threatened her that the company could take disciplinary action against her.

In order to understand the matter at hand, it is necessary to recall that section 128(1) of the Code gives every employee who has reasonable cause to believe that a condition exists in any place that would constitute a danger, the right to refuse to work, and that under section 147, it is an offence for an employer to punish employees because they have exercised this right. Section 147 provides:

*"147. No employer shall*

*(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee*

*(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,*

*(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or*

*(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; or*

*(b) fail or neglect to provide*

*(i) a safety and health committee with any information requested by it pursuant to paragraph 135(6)(j), or*

*(ii) a safety and health representative with any information requested by the representative pursuant to paragraph 136(4)(e)."*

## II

The material facts of Ms. Di Palma's refusal to work which led to the incident giving rise to this complaint are set out in Antonia Di Palma (1995), 98 di 161 (CLRB no. 1131). In that decision, the Board confirmed the safety officer's finding of absence of danger.

For the purposes of the present decision, however, let us recall that at all times material to this complaint, Ms. Di Palma was employed by Air Canada as a flight attendant. On September 9, 1994, halfway through a Toronto-Montréal flight, she became sick and was given oxygen. Ms. Di Palma felt that there was not enough air in the aircraft and that the environment was dangerous to her health. As a result, she invoked her right to refuse to work pursuant to the Code (Part II- Safety and Health). Believing that she was ill, the chief pilot arranged for medical assistance upon arrival and did not treat her action as a refusal to work. As a result, the investigation into the refusal was only carried out much later.

The incident giving rise to the present complaint occurred at the December 3 investigation meeting, in connection with Ms. Di Palma's refusal to work during which the safety officer, Mr. Umberto Tamboriello, ruled verbally that there was no danger within the meaning of the Code. At that meeting, Ms. Sénécal and five other Air Canada representatives (Messrs. Lafleur, Bergeron, Dice, Charland and Torianni) were present, along with the safety officer, Ms. Di Palma and her representative, Mr. Tracy Angles. Ms. Di Palma's recollection of the events is set out in a memorandum to CUPE's Health and Safety Committee dated December 5, 1994:

*"This is a formal complaint about Air Canada's attorney Louise-Hélène Sénécal who threatened and intimidated me at the meeting held Dec. 3, 1994 regarding my 'Refusal to work'.*

*At this meeting, after the Transport Canada Officer, Mr. Tamborriello, rendered his decision that he found an 'absence of danger' he proceeded to inform me of my rights and obligations.*

*He said that my obligation was to go back to work and that my rights included that 'the employer could not reprimand me for having taken such an action.'*

*At this Mme. Sénécal replied, 'Yes, but if the employer deems that the employee was not justified in taking such an action then the employer can take disciplinary action.' I asked, 'What can that be?' She replied, 'Even dismissal.' then she added that in the United States there had been a case where two Flight Attendants had refused to work and in the end the employer did take disciplinary action. I asked, 'were they fired?' She said, 'Oh I don't remember.' I replied that I detected a 'hint' of intimidation in all this and Mme Sénécal said that no, she was just informing me.*

*I did feel threatened and intimidated by her remarks and I also feel that Mr. Tamborriello did not clearly defend my rights as an employee. He should have informed her that according to the Labor Code she had no right to threaten me with dismissal or disciplinary action.*

*I consider this a very important issue and I hope that it will be looked into.*

*Your truly,*

*Antonia DiPalma  
Air Canada Employee"*

Ms. Sénécal, Air Canada's legal counsel at the December 3, 1994 meeting, responded to these allegations by explaining that the comments she made after Mr. Tamborriello's summary of Ms. Di Palma's rights and obligations under the Code following a finding of absence of danger were simply meant as a follow-up to what the safety officer had said. It was Mr. Tamborriello's first case and, at a prior meeting, Ms. Di Palma had indicated that she felt at a disadvantage in view of the fact that she was not represented by a lawyer. Consequently, since she was leading the discussion, Ms. Sénécal had tried to make sure that Ms. Di Palma received all the necessary information, i.e. that she understood the implications of continuing to refuse to work after a finding of no danger. Ms. Sénécal told the Board that she felt that it was not enough to say that the employee was completely protected as a result of her refusal.

She referred to the case law which had been provided to Ms. Di Palma's union representatives and to the safety officer at a previous session held on November 29, 1994. Ms. Sénécal's position in this regard is that this was meant as a clarification only and that she had never addressed Ms. Di Palma personally during that meeting or that day. Ms. Sénécal added that when the complainant reacted to her remarks, Mr. Lafleur intervened immediately and said something like "Come on Antonia - That's not what we're doing! We're informing you, that's all" or "It's just information." Finally, Ms. Sénécal told the Board that if Ms. Di Palma had felt uneasy about this, she apologized, reiterating that she had only wished to provide information.

Mr. Angles, also present at the December 3 meeting, was called as a witness by the employer. He confirmed Ms. Sénécal's version. He testified that as a union representative, he had not taken offense at what had been said at that time because Ms. Di Palma had chosen to speak on her own behalf. He remembered that after hearing Ms. Sénécal's comments, Ms. Di Palma had said something to the effect that she felt threatened and that Mr. Léonard Lafleur, Air Canada's Manager Customer Service, In-Flight East, had then told her that she was not being threatened, that they were just providing information.

In cross-examination by CUPE's representative, Mr. Angles recalled that Ms. Sénécal had interjected to submit some case law after Mr. Tamboriello told Ms. Di Palma about the protection of section 147 of the Code. He remembered vaguely that Ms. Sénécal had referred to a group of flight attendants in Florida and mentioned that the disciplinary action taken in this instance had been upheld, but he could not remember whether Ms. Sénécal had said the words "even dismissed." However, he did remember that Ms. Di Palma had asked whether they had been fired and that he might have been the one who had said "no", that they had been suspended.

Mr. Angles told the Board that Ms. Di Palma had objected to the filing of this case law by Ms. Sénécal, and that Ms. Di Palma had then asked her "Are you threatening

me?" According to Mr. Angles, both Ms. Sénécal and Mr. Lafleur had tried at this point to reassure Ms. Di Palma that such was not the case. In particular, he recalled that they had said that no one was threatening her.

Mr. Lafleur testified along the same lines. He stressed that Ms. Di Palma was a good flight attendant and that they had gone to great lengths to try to get her back to work. He remembered that when Mr. Tamboriello had rendered his decision, Ms. Di Palma had reacted and Ms. Sénécal had given some information concerning an aspect of the decision. Ms. Di Palma had then stated that she felt threatened. He also remembered that he had reacted to that statement and that he had interjected to tell her that no one was threatening her, that they were simply providing information. He added that there was nothing in the tone of voice or behaviour of Ms. Sénécal which indicated that there was a threat. In this regard, we should stress that Ms. Di Palma herself confirmed that Ms. Sénécal had neither raised her voice nor shown any aggressive behaviour.

Mr. Andrew Torianni, Air Canada's Manager Labour Relations, also confirmed this version of the facts. He was the one who had contacted Ms. Sénécal because he wanted legal advice. He was concerned about the potential impact of the decision on the work environment and, since there had been no resolution, he would have to be present at the hearing into the matter. Mr. Torianni stated that in view of the reassurances offered to Ms. Di Palma by Ms. Sénécal and Mr. Lafleur to the effect that nothing that had been said was ever meant as a threat, he was satisfied upon leaving the meeting that everything was fine. At first, he was worried that Ms. Di Palma had misconstrued what Ms. Sénécal had said and he was happy to see Messrs. Lafleur and Tamboriello explain to her that they were not attempting to intimidate her; all they had wanted to do was to provide her with some information.

Mr. Tamboriello, for his part, recalled that following his announcement of the decision and his statement that the employer could not take any action against the employee for having exercised a right under the Code, Ms. Sénécal provided

additional information. Although he remembered that Ms. Sénécal had referred to a case dealing with a similar matter and that Ms. Di Palma had taken exception to Ms. Sénécal's comments, he had no opinion as to what Ms. Sénécal had said. However, he did remember that Ms. Di Palma had been told that she could stay off work and that this had been said in a cordial tone.

At the hearing, Ms. Di Palma admitted that she had not been disciplined following her refusal to work. She was basically kept on sick leave throughout the relevant period and had no dealings with the Company. After having been notified of the Board's decision confirming the safety officer's finding of absence of danger, however, Ms. Di Palma had to undergo a medical examination which declared her fit to work. As a result, she was notified that she would have to resume her flight attendant's duties as of September 1995. She refused this demand because, in her view, the situation which had caused her to refuse to work had not changed and she was afraid to fly. (She had, however, gone back to work following her work refusal and completed certain blocks of flights before the December 3 decision.) Ms. Di Palma was eventually terminated on the ground that she would not accept work assignments. No complaint was filed with the Board with respect to her termination and there were no attempts to imply that it had anything to do with the September 9, 1994 incident.

### III

The complaint, therefore, deals only with what transpired at the December 3, 1994 meeting, and the only issue to be determined is whether the remarks made at the time by Air Canada's legal representative amounted to a threat of disciplinary action contrary to section 147 of the Code, because the complainant had acted in accordance with section 128(1) of the Code.

Pursuant to section 133(6) of the Code, where, as in this case, the alleged threats are covert, the employer must convince the Board on the balance of probabilities that it had never intended to threaten the complainant (see Roland D. Sabourin (1987), 69

di 61 (CLRB no. 618)). To discharge its burden of proof, the employer must therefore adduce sufficient evidence to support this contention, namely, that the conduct at issue did not result from this particular subjective state of mind.

The evidence adduced at the hearing unequivocally established that no one else who attended the December 3, 1994 meeting shared Ms. Di Palma's perception that her employer had attempted to threaten her. Except for the safety officer who volunteered no opinion and Ms. Di Palma, all other persons present, including her union representative, testified that they had not perceived these comments as a threat, even though they all recalled that Ms. Di Palma had voiced such a concern at the time.

We are satisfied that this is the correct view and believe that Ms. Sénécal had simply volunteered information in order to clarify the employee's rights and obligations under the Code.

To state this, is of course, in no way to reflect adversely upon the concerns that Ms. Di Palma may have felt at the time. That she misinterpreted the remarks by reading too much into them is not entirely surprising in view of her circumstances then. She had just been told by the safety officer that he did not share her belief that there existed a danger pursuant to the Code. Therefore, it was to be expected that she would view suspiciously any remark aimed at volunteering information about what might happen to an employee in a situation comparable to hers.


Much as the timing for these remarks may have been unfortunate, there was nothing threatening about what Ms. Sénécal said at the December 3 meeting. The evidence confirmed that there was no intention to harm. The remarks were meant as a clarification. That they were perceived as a threat does not change this fact for the purposes of the Code.

Taking everything into consideration, particularly having regard to the oral evidence adduced, the Board is of the view that the employer has discharged its burden of proving that it never intended to threaten Ms. Di Palma. Air Canada did not violate the Code. It simply provided information. There was no attempt to pressure or threaten the employee. Accordingly, the complaint is dismissed.




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J. Philippe Morneault  
Vice-Chair



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Véronique L. Marleau  
Member



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Roza Aronovitch  
Member



# information

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## Summary

United Steelworkers of America, *applicant*,  
and Curragh Resources Inc., and Anvil Range  
Mining Corporation, *employers*.

Board Files: 585-580  
745-5211

CLRB/CCRT Decision no. 1160  
May 3, 1996

## Résumé

Métallurgistes unis d'Amérique, *requérant*, et  
Curragh Resources Inc. et Anvil Range  
Mining Corporation, *employeurs*.

Dossiers du Conseil: 585-580  
745-5211

CLRB/CCRT Décision n° 1160  
le 3 mai 1996

The Board is seized of two applications. The first is pursuant to section 44 of the Canada Labour Code for a declaration of sale of business. The second is pursuant to section 97 of the Code and alleges a violation of sections 50(a) and (b) of the Code.

Starting in 1969, Cyprus Anvil Mining Corporation conducted open pit mining operations near the town of Faro in the Yukon Territory. A crusher and a mill were constructed nearby. In 1982, Cyprus ceased operations. In 1985, the crusher and mill and certain other equipment were acquired by Curragh Resources Inc., which began operations at the same open pit in 1986 and mined another open pit from 1990 to 1993. The produce from both pits was processed at the crusher and mill near Faro. In 1993, Curragh ceased operations and a receiver was appointed. The respondent, Anvil Range Mining Corporation, was incorporated in February 1994. It purchased the Faro operations of the Curragh property in June 1994. After refurbishing work, the respondent began mining, crushing and milling operations in 1995.

Le Conseil a reçu deux demandes: la première présentée en vertu de l'article 44 du Code canadien du travail vise à obtenir une déclaration de vente d'entreprise; la deuxième déposée aux termes de l'article 97 allègue violation des alinéas 50a) et b) du Code.

En 1969, Cyprus Anvil Mining Corporation a commencé à exploiter une mine à ciel ouvert près de la municipalité de Faro, au Yukon. Une usine de broyage et une usine de traitement ont été construites tout près. En 1982, Cyprus a cessé ses activités. En 1985, Curragh Resources Inc. a acheté les deux usines et d'autre matériel et a commencé à exploiter la mine à ciel ouvert en 1986. Par la suite, Curragh a exploité une deuxième mine à ciel ouvert de 1990 à 1993. Tout ce qui était produit était traité à l'usine de broyage et à l'usine de traitement près de Faro. En 1993, Curragh a cessé ses activités et un syndic a été nommé. L'intimée, Anvil Range Mining Corporation, a été constituée en société en février 1994. Elle a acheté le volet Faro des installations de Curragh en juin 1994. À la suite d'une remise à neuf, l'intimée a commencé ses opérations minières et ses activités de concassage et de broyage en 1995.

The fact that there was a two-year hiatus in operations does not prevent a finding that there was a sale of business within the meaning of the Code. Here, the respondent is carrying on essentially the same business as its predecessor. The fact that it has spent a great deal of time and money making the property capable of efficient operation likewise does not prevent the application of article 44 of the Code. The Board thus declares that there has been a sale of business within the meaning of the Code. This finding should be sufficient to allow the parties to resolve the other outstanding issues between them, including the section 50 complaints. In the event the parties are unable to do so, hearings in the matter will continue.

Le fait qu'il y ait eu une période d'inactivité de deux ans ne nous empêche pas de faire une déclaration de vente d'entreprise au sens du Code. En l'espèce, l'intimée s'occupe essentiellement du même genre d'exploitation que son prédécesseur. Le fait qu'elle ait consacré beaucoup de temps et d'argent à remettre les installations à neuf pour que l'entreprise fonctionne bien n'empêche pas l'application de l'article 44 du Code. Par conséquent, le Conseil déclare qu'il y a eu une vente d'entreprise au sens du Code. Cette conclusion devrait permettre aux parties de trancher les questions qui sont toujours en litige, y compris les plaintes fondées sur l'article 50. Si les parties ne parviennent pas à s'entendre, le Conseil tiendra d'autres audiences à cet égard.

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LES MOTIFS DE DÉCISION DU CCRT SONT  
MAINTENANT ACCESSIBLES DANS QUICKLAW.

## Reasons for decision

United Steelworkers of America,

*applicant,*

*and*

Curragh Resources Inc.,

*and*

Anvil Range Mining Corporation,

*employers.*

Board Files: 585-580

745-5211

CLRB/CCRT Decision no. 1160

May 3, 1996

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The Board was composed of J.F.W. Weatherill, Chairman and Michael Eayrs and Véronique L. Marleau, Members. A hearing was held on December 18, 19 and 20, 1995, at Vancouver.

### Appearances

Mr. Brian Shell, Counsel for United Steelworkers of America, assisted by Mr. Mark Rolanson and Mr. Ken Newmann, and

Mr. Sean Day, Counsel for Anvil Range, assisted by Chris Reid, Director Human Resources and Mr. Kurt Forgaard, President of Anvil Range.

These reasons for decision were written by J.F.W. Weatherill, Chairman.

There are two applications before the Board. Each is dated July 28, 1995.

One is an application pursuant to sections 44 and 46 of the Canada Labour Code for a declaration that a sale of business within the meaning of the Code has occurred, and that the respondent employer, Anvil Range Mining Corporation, is bound by the terms

of a collective agreement entered into between the applicant and the alleged predecessor employer, Curragh Resources Inc. Curragh was placed into receivership and Peat Marwick Thorne Inc. was appointed as receiver. Peat Marwick is the alleged transferor pursuant to the sale of business application.

The other is an application made pursuant to section 97 of the Code, alleging violation of section 50(a) of the Code, in that the respondent is said to have failed to make any effort to enter into a collective agreement with the applicant, and of section 50(b) of the Code, in that the respondent is said to have altered the terms and conditions of employees in a bargaining unit following the issuance of the applicant's notice to bargain. Ministerial consent to the proceedings under section 50 of the Code was granted on October 10, 1995.

## I

While not formally consolidated, both applications were set down for hearing at the same time. The applicant wrote to the Board to request the production of documents prior to the hearing. Since the Board only has the power to grant such requests within the confines of a public hearing: see Canadian Air Line Pilots Ltd. v. Canadian Air Lines Pilots Assn. [1993] 3 S.C.R., page 724, consideration of that request was deferred for the purposes of being addressed at the hearing.

At the hearing of this matter, counsel for the parties, following opening statements, agreed that as a matter of convenience, the evidence of the respondent would be heard first, although the burden of proof remained with the applicant and the ruling on production of documents was accordingly deferred. The Board heard the evidence in chief of Mr. K.A. Forgaard, President of the respondent employer, and then, following that evidence in chief, counsel for the respondent described what he expected would be the evidence of Mr. C. Reid, Director of Human Resources. Upon the completion of the examination in chief of Mr. Forgaard and the statement by

counsel the Board, considering the evidence before it and the statements of counsel as to the cases to be presented, made the following procedural suggestion:

*"In the Board's view, this matter may now be argued on its merits, on the basis of what must be considered the respondent's best case, which is now before us. The Board has heard the evidence in chief of the principal witness for the respondent, and has had described to it in general terms the evidence to be given by Mr. Reid relating to certain employment figures, which in general are not in doubt. Based on what we have heard, it is at least arguable that in the circumstances of this case there has been a successorship within the meaning of the Code. Accordingly, we invite counsel to make arguments to the Board on the merits of the case tomorrow morning. This will be without prejudice to the right of counsel for the union to cross-examine, and without prejudice to the rights of both parties to present further evidence in the event the Board is not persuaded that a successorship has occurred. Proceeding in this way may well avoid the wastage, disruption and bad feelings which would be caused by a protracted hearing, without prejudice to the rights of the parties to present their cases properly."*

Counsel agreed to the procedure suggested, and the matter was argued the following day. Subsequently, on December 20, 1995, the Board, by its Clerk, advised the parties that it would be able to decide the matter on the evidence already before it, and that therefore it did not need to hear additional evidence from them. The Board has considered the evidence and the arguments made at the hearing.

The parties were advised of the decision itself on February 22, 1996, by Letter-Decision No. 1504. By that letter, which was referred to as the Board's partial decision in the matter, the parties were advised that the Board had "determined, on the evidence submitted by the employer, that there was in fact a sale of a business within the meaning of section 44 of the Canada Labour Code, in the circumstances of this case", and that Reasons for decision were in the course of preparation.

On March 12, 1996, the Board issued a formal Order declaring that a sale of business had occurred, substituting the name of the respondent employer for that of the

predecessor employer in the relevant Order of Certification, and recognizing that the applicant trade union continued to be the certified bargaining agent for the bargaining unit in question.

We now set out the Reasons for the decision issued on February 22, 1996, in File No. 585-580. It will be remembered that the Board bases this decision on the materials filed with it by the respondent, and on the uncontradicted evidence adduced by the respondent at the hearing.

## II

The essential facts of the matter may be briefly set out, and in any event would not appear to be the subject of any significant dispute. Very substantial lead-zinc deposits are to be found near the town of Faro, in the Yukon Territory. A company called Cyprus Anvil Mining Corporation developed, and starting in 1969 mined, by open-pit mining, certain zones of an area known as the Faro Pit, near which were constructed a crusher and a mill. The products of these operations were shipped as concentrates to the port of Skagway, Alaska, and were sold on the world market. Cyprus Anvil ceased mining operations in 1982.

The properties, the crusher and mill, and certain equipment were acquired in 1985 by Curragh Resources Inc. That company began mining operations at the Faro Pit in 1986, and then developed and mined another property in the area, the Vangorda Pit, from 1990 until 1993. Ore from the Vangorda Pit was processed at the crusher and Mill near the Faro Pit. As well, Curragh Resources began stripping (removal of the overburden) operations at a nearby property known as the Grum Pit. Curragh Resources ceased operations in April, 1993, and a receiver of its property and assets was appointed on October 15 of that year. The respondent in the instant case, Anvil Range Mining Corporation, was incorporated in February, 1994, to pursue the acquisition of the Faro property, with the ultimate intention of mining and

concentrating the zinc and lead ores located on the property, and the marketing of such concentrates. The company's bid was successful, and a purchase agreement between the company and the receiver received Court approval in June, 1994. The sale was completed in November of that year, and the respondent then began preliminary refurbishing work which enabled it to begin mining, and subsequently, crushing, milling and shipping operations in 1995.

In addition to its payment of some 27 million dollars to the receiver for the property and assets, the respondent has since spent some 125 million dollars or more in capital expenditures on virtually all aspects of the mining and milling aspects of the Faro operations. While Anvil Range has not had the benefit of any contracts which had been entered into by Curragh Resources, product is now being shipped to virtually the same market, or type of market, as that which the operation had previously supplied. Although it would appear that only a relatively small proportion of the current operational work force consists of former employees of Curragh, Anvil Range also hired some of Curragh's previous management personnel. The current President and CEO of Anvil Range is a former officer of Curragh. However, he had left Curragh before it went bankrupt.

### III

The portions of section 44 of the Canada Labour Code which are material to the disposition of the application before us are:

*"44. (1) In this section and in sections 45 and 46, "business" means any federal work, undertaking or business and any part thereof; "sell", in relation to a business, includes the lease, transfer and other disposition of the business.*

*(2) Subject to subsections 45(1) to (3), where an employer sells his business,*

*(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent. "*

*(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;*

*(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business"; and*

Section 46 of the Code is as follows:

*"46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question. "*

#### IV

This issue before the Board in a successorship application is, of course, whether there has been a transfer of a "business" or "part" of a business within the meaning of section 44 of the Code. The object of the transfer must be examined to determine whether a business or a part of it has changed hands, as opposed to a mere collection of assets. We must also determine whether the alleged transfer itself has indeed occurred. That such is the case will, of course, be much more readily apparent if there is a substantial continuity of all the elements of the predecessor's business. In other words, the business transferred must be operated for the same purpose by the transferee and there must be continuity in the work and activities carried out by the employees.

1) The object of the transfer: the business

The Board has adopted an instrumental approach to successorship. The rationale for this approach is ably explained by the Ontario Labour Relations Board in its decision Accomodex Franchise Management Inc., [1993] OLRB Rep. 281:

*"55. The instrumental approach to successorship suggests that bargaining rights are attached to an economic vehicle - the mechanism, resources or facilities by which the undertaking serves its purpose - rather than the purpose itself, the employees, or their work. Bargaining rights attach to the business undertaking. The Board then tries to determine, from a labour relations perspective, whether the transfer and continuation of some facet or facets of that undertaking, warrants a continuation of bargaining rights - for, of course, when interpreting section 64, the Board has to keep in mind its purpose and effect. The Board tries to reach a result which is fair to both the statute and the context under review - that is, a result that appears to be called for to remedy the mischief for which section 64 was passed. That mischief is not the loss of work or work opportunities, but rather the disruption of bargaining rights which would flow from a change in the ownership but continuation of all or part of the elements that make up the business."*

Various general forms of words have been used by this and other labour relations boards applying similar legislative provisions as to what constitutes a business or the sale of a business for the purpose of such provisions. We would rely again on what was said by the Ontario Labour Relations Board in Accomodex Franchise Management Inc., *supra*:

*"54. A "business" is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market; and, over the years, the Board has come to what might be described as an "operational" or "instrumental" interpretation of that term. In St. Leonard's Society of Metropolitan Toronto, [1993] OLRB Rep 56, the Board put it this way:*

*'The Board's conception of the "business" under the Labour Relations Act is an operational or instrumental one. The business is not its legal envelope, nor the employees, nor some incidental or unrelated grouping of assets, nor the body of work in which employees may be engaged from time to time. It is a delivery system, an economic vehicle, an*

*organizational means of getting something done. It is to this vehicle that bargaining rights attach and in which they continue if the undertaking or a coherent part of it is transferred to a new owner.'*

*This also seems to be the approach taken by the Supreme Court of Canada in Syndicat national des employés de la Commission scolaire régionale de l'outaouais (CSN) v. Union des employés de service local 298 (FTQ), Bibeault et al. [1988] 2 SCR 1048 - a decision involving the successor rights provisions of the Québec Labour Code. Beetz J. describes a business undertaking as something that "consists of a series of different components which together constitute an operational entity", and "all the means available to an employer to obtain his objectives".*

(pages 294-295)

The same principles apply when the object of the transfer is a "part" of a "business". The predecessor must have transferred a coherent and severable "part" of its undertaking or business. A variety of factors must be considered to determine whether there was a transfer of a distinct part of the predecessor's business: plant, equipment, know-how, goodwill, employee skills, specific expertise, etc. The type of economic organization in question and the nature of the industry involved are of considerable significance in this analysis. As the OLRB stated in Accomodex Franchise Management Inc., *supra*, at page 299:

*"70. ... Factors which may be sufficient to support a "sale of a business" finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses these factors will be insignificant. ..."*

Thus, even where no employees of the predecessor are employed by the successor (although this was not the case here), that is not a significant factor: Victoria Flying Services Ltd. et al. (1979), 35 di 73; and [1979] 3 Can LRBR 216 (CLRB no. 199).

Further, as other labour boards have found in recent years, the economic context can no longer be ignored as a relevant factor to consider when determining whether a going concern has changed hands as opposed to the transfer of an idle collection of assets, and the nature of the predecessor's business and discernable continuity in the successor's business should be analyzed from a labour relations point of view: Redskin Cedar Company Ltd., 12 CLRBR (NS) 153 (BCLRB); and Accomodex Franchise Management Inc., *supra*:

*"59. As might be expected in a labour relations statute, the Board pays particular attention to the "character" of the business (a matter referred to in section 64(5)) [note: no such reference appears in the material provisions of the Canada Labour Code] and the characteristics of the employer/employee relationship, because, from a labour relations point of view, the importance of the business is that it generates work opportunities for employees. The activities of the business require it to enter the labour market as an employer, and this, in turn, can give rise to the employment or collective bargaining relationships with which the Act is concerned, and which section 64 is designed to preserve. Accordingly, in determining whether there has been a "sale" within the meaning of the Act, the Board attaches particular significance to the nature of the work performed in, and by, the business, before and after the alleged transfer. If the nature of the work performed subsequent to the transfer is substantially similar to the work performed prior to that transaction (and if the employees, or types of employees, are the same) this would normally support an inference that there has been a transfer of a business or part of a business within the meaning of section 64. This approach with its focus on jobs is one that seems to have been taken by the B.C. Court in R.v.B.C. Labour Relations Board ex parte Lodum Holdings Ltd. (1969) 3 D.L.R. (3d) 41. At p. 52, Dryer, J. commented:*

*"The importance of the "business" in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That*

*depends on a number of factors, such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods and services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.'*

*60. Unless there is a continuation of work and jobs, it would make little sense to preserve the collective bargaining relationship or collective agreement. Conversely, if the work, jobs, or employees are the same or substantially similar, it is easier to conclude that the transaction is one to which section 64 was intended to [apply] - and that is especially so if the work is being performed in the same context, at the same location, with the same equipment, or in respect of the same clientele."*

(pages 294-296)

While we would consider that the term "business" applies, for purposes of the Code, to non-commercial as well as to "commercial" enterprises, we are otherwise in agreement with what the Ontario Labour Relations Board has said in the foregoing passages. Those statements are consistent with what this Board has said in most earlier cases.

## 2) The transfer itself: disposition and continuity

The method by which a business or part of a business passes from a predecessor to a successor employer is not determinative; a sale by a receiver, as here, could, depending on the circumstances, constitute a sale within the meaning of the Code: Logistec Corporation et al. (1986), 67 di 120; 15 CLRBR (NS) 338; and 87 CLLC 16,008 (CLRBR no. 593); and Seaspan International Limited (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRBR no. 190). As stated by the Board in the latter case:

*"The focus of the Board's attention in such cases is neither upon the formalities of ownership or the particular methods whereby the business changes hands. The Board is concerned more with realities than appearances and its enquiry is directed towards the*

*establishment of the identity of the employer who has acquired, by means encompassed by [section 44] the control and use of the business."*

(pages 43-44)

In Logistec Corporation et al., supra, the Board rejected the proposition that a corporate dissolution prevented any application of section 44. The Board concluded that dissolving or dismantling a business does not automatically flow from a corporate dissolution. This is a question of fact, each case having to be examined on its merits, having regard to the Board's policy in the context of successorship applications, as set out in Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402), which adopted the approach and criteria elaborated in Metropolitan Parking Inc., [1979] O.L.R.B. Rep. 1193. The Board's rationale for so holding appears from the following excerpt of Logistec Corporation et al., supra:

*"The dissolution of a business is not synonymous with liquidation of a corporation. Obviously, these are two quite separate realities, two concepts that must not be confused.*

*It is not the dissolution of the corporate vehicle that prevents transfer of rights flowing from certification, but the dismantling or dissolution of the business itself; the former does not necessarily result in the latter. If this were the case, changes in the corporate structure could affect the permanence of collective bargaining rights.*

*The Board has always distinguished the business itself from its corporate vehicle and interpreted section 144 of the Code so as to ensure that these rights are maintained regardless of changes in this regard. This is precisely one of the underlying reasons for section 144.*

*The dissolution of a company, like its formation, is carried out according to a legal procedure. For example, under the Winding-up Act (R.S.Q., c. L-4) and the Canadian Business Corporation Act (S.C. 1974-75-76, c.33, amended by S.C. 1978-79, c.9), any assets of the company must be liquidated before it is dissolved. These assets may be non-productive assets or, on the other hand, they may form a going concern. Liquidating a commercial corporation may thus be voluntary or involuntary. The liquidation of the business is*

a stage in the process culminating in the dissolution of its corporate vehicle. The liquidation stage is not necessarily different from any other circumstances where disposition takes place; it merely involves a liquidation or a putting up for sale. Nothing prevents what is sold from being a going concern.

The dictionary defines liquidation as "the action of liquidating, of converting into cash". Although liquidation of a company may result in the dissolution of its business, such dissolution is not necessarily an inevitable consequence of liquidation. In fact, if the business is sold, it can only be prior to the dissolution; legally, dissolution may only occur after such a sale has taken place.

There are numerous precedents supporting the fact that a sale of business may occur in the context of its liquidation, even if forced. For example, see: Roy Brandon Construction, [1981] RLRB Rep. Feb. 219 (bankruptcy); Clean & Brite Laundry, *supra*; Winiker Industrial Auctioneers Ltd., [1978] OLRB Rep. Jan 15 (liquidation by an appointed receiver-manager); Marvel Jewellery Limited and Danbury Sales (1971) Ltd., *supra* (sales under receiving order); Hughes Boat Works Incorporated, [1977] OLRB Rep Dec. 815 (sale under receiving order); Big Bear Storage, [1979] OLRB Rep. March 164 (sale under receiving order); Sisman's of Canada Limited, [1980] OLRB Rep. July 1059 (sale under receiving order); C & C Markets Inc. (1983), No L38/83 BCLRB) (bankruptcy); Travel-Mate Industries Ltd., (1982), No. L35/82 (BCLRB) (sale by receiver); Shelter Industries Inc. (1978), 30 SLR 38 (bankruptcy); West-Can Photo & Graphic Supply Ltd. (1985), 36 SLR Aug. 45 (sale by receiver-manager); Taylor Ford Sales Ltd. and Brunswick Ford Sales Ltd., [1981] 1 Can LRBR 138 (N.B.) (receiving order and transfer of a concession); Association des employés de G.D.I. Inc. c. Raymond Chabot, Martin et paré, No. 84T-527 (L.C., Robert, Burns, J. (sale by receiver-manager)). For a case of liquidation in the context of voluntary dissolution of a public corporation, see Re Sollars and Canadian Union of Public Employees et al. (1984), 9 D.L.R. (4th) 145 (Sask. C.A.).

Thus we cannot state that dismantling or dissolving a business is necessarily a result of bankruptcy or a forced sale. It is a question of fact. Each case must be examined on its merits, that is, according to the approach adopted by the Board in Terminus Maritime Inc., *supra*, and set out in Metropolitan Parking Inc., *supra*.

*All this means that, for the purposes of the Code, insolvency does not in itself result in the dissolution of a business as a going concern.*

*Since a business is defined as an economic vehicle (Metropolitan Parking Inc., *supra*) and not as a corporate entity, it could, depending on the circumstances, survive financial difficulties or insolvency and continue as a going concern. Again, it is a question of fact. In Antonacci Clothes Inc. [1984] OLRB Rep. July 887, the Ontario Labour Relations Board wrote:*

*'...The fact that the owner of a business is in financial difficulty at the time of an alleged sale has never been fatal to the argument that a 'sale of business' has occurred. Any number of Board decisions have held that dispositions by trustees in bankruptcy, court appointed receiver-managers, and receiver-managers appointed by instrument can constitute a sale of business: see, for example, Marvel Jewellery Ltd., [1975] OLRB Rep. Sept. 733; Hughes Boat Works Inc., [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed at (1980) 26 O.R. (2d) 420); Winiker Industrial Auctioneers Ltd., *supra*; Big Bear Storage, *supra*; and Shiffer-Hilman Clothes, *supra*. In each of these cases the financial difficulties of the owner had led the trustee or receiver to engage in transactions which, as the Board found in each case, resulted in a sale of business. In Marvel Jewellery Ltd., for example, the receiver continued to operate the business while attempting to sell it as a going concern. After having no success, the receiver ceased operations, terminated the employees and closed the plant. The transaction ultimately found to be a sale of business was first proposed to the receiver only after all these events had occurred...' (pages 897-898; emphasis added)"*

(pages 173-175; emphasis in the original)

Thus, even where the day-to-day operations of a business may be interrupted, even for substantial periods of time and for substantial renovations, reconstruction or repairs there may still, in appropriate circumstances, be found to be a sale of business within the meaning of the Code: Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640);

see also Long Lake Forest Products Inc. [1994] OLRB Rep. 1343; Hughes Boat Works Incorporated, 0655-77-R, confirmed by Re Hughes Boat Works Inc. (1979) 26 O.R. (2d) 420; and Redskin Cedar Company Ltd., *supra*. The rationale for such a conclusion has been well developed in the decision of the Ontario Labour Relations Board in Accomodex Franchise Management Inc., *supra*. This is a significant aspect of the present case, and it is appropriate to set out at some length what the Ontario Labour Relations Board said at pp. 299 - 300 of its decision:

*"72. In cases which arose when the economy was buoyant, or transactions involved a whole, ongoing business, the Board once tended to focus on the dynamic quality of a business or its operations as a "going concern". If that dynamic quality was lacking, the Board was inclined to hold that there had been no transfer of a business but merely a disposition of assets. In more recent years and more troubled economic times, the absence of this dynamic quality has been accorded less significance.*

*73. Quite apart from questions of successorship, it has become much more common in recent years for businesses (or parts of them) to shut down for periods of time and lay off employees, then reopen again when the market improves - without anyone suggesting that the union's bargaining rights or the employees' recall rights, for that matter, have disappeared. In this era of corporate "restructuring", it has also become much more common for businesses to discontinue or hive off portions of their operation or undertaking, which then become the nucleus or even the entire undertaking of the "new" business organization. If instead of reopening on its own, or reviving this commercially-moribund portion of the operation, it was transferred to someone else - as increasingly happened through receivers - it was much less clear than it once might have been, that bargaining rights should disappear merely because that portion of the ideal undertaking was now owned by someone else - especially since the purpose of section 64 is to eliminate the significance of the fact that a new legal entity owns the "things" that have been transferred. Clearly there is a potential tension between commercial law considerations, a layman's view of the "business", and the objectives reflected in the Labour Relations Act, but it has become much less evident in recent years that this tension should be resolved by the Board "reading into" the statute the words "as a going concern", after the word "business" in section 64(2). The concept of a "going concern" and the words "as a going concern" are not unknown in law, but in drafting*

*section 64, the Legislature has not injected that phrase and it is not intuitively obvious that the Board should be doing so as a matter of interpretation. This is not to say that the absence of ongoing activity is irrelevant; merely that it may not be determinative.*

*74. If a new investor bought the controlling shares in a dormant company with idle assets and brought them to life with an injection of capital, there is little doubt that the union's bargaining rights would continue in respect of that company now that it had become active. A union would not need to invoke section 64 because, although there had to be a "sale of a business" in common parlance and commercial law terms, the legal entity with which it has bargaining rights - the "owner" of the assets - would be unchanged. Bargaining and collective agreement rights would continue. Should the result be different from a collective bargaining point of view, if the same investor used the same funds to purchase the assets themselves rather than the controlling shares in the corporate envelope, but, as before, revived the business as a going concern under new ownership?*

*75. With the experience of two recent recessions and a considerable amount of corporate restructuring, the Board is less inclined than it once might have been, to give overriding significance to the absence of ongoing business activity at or before the point of alleged "sale". A business shut-down or closure remains significant, but it is not always determinative. As the Board noted recently in New Dominion Stores, [1989] OLRB Rep. 473:*

*'Similarly, hiatus between closure and opening of a business is not determinative, but only one factor. The fact that the hiatus between the closure of Dominion Store #986 and the opening of the A&P store was quite long, twenty-two months, does not itself mean that the business of the former has not been transferred to the successor. There is no temporal bright line beyond which bargaining rights will not transfer. If all the circumstances yield a conclusion that a business, or part thereof, has been transferred, then the appropriate declaration will issue, whether the interval be twelve months or twenty-two months'.*"

In Terminus Maritime Inc., *supra*, the Board stated at page 184, referring to its earlier decision in Newfoundland Broadcasting Ltd. (1978), 26 di 576; and [1978] 1 Can LRBR 565 (CLRB no. 120), "First, there must be continuity in the work and activities

carried out by the employees and, second, the business sold must be operated for the same purpose by the purchaser". The reference to "continuity" must be read in the light of what has been said above, and in particular in light of the first passage cited above from Accomodex Franchise Management Inc., *supra*, as well as in light of what this Board said in Curragh Resources and Altus Construction Services Ltd., *supra* at p. 222:

*"This factual enquiry permits, for example, when the circumstances are appropriate, a finding of sale ... even where there is a hiatus between the closure of a business and its subsequent reopening or the passage of a business through a third party."*

V

The question of substance in the instant case is whether or not what the respondent Anvil Range purchased was the business which had been operated by Curragh Resources, and for whose employees the applicant trade union was the bargaining agent.

In the instant case the respondent Anvil Range is, we find, carrying on essentially the same business as its predecessor on the property. It is exploiting the lead-zinc reserves on the Faro properties, using the same facilities, the same or related ore bodies, similar techniques, the same or similar equipment, some of the same employees and in any event having essentially the same tasks performed. The work, undertaking or business in which Curragh Resources had been engaged on the Faro property is the same work, undertaking or business in which Anvil Range is now engaged. Certainly Anvil Range, having purchased the assets of the "dormant" (but not abandoned) operation, spent a great deal of time and money, as we have said, in making the property capable of efficient operation. In Curragh Resources and Altus Construction Services Ltd., *supra*, which involved an earlier change in operations at the Faro properties, the Board concluded, on the evidence before it, that Curragh Resources was not the successor employer to Cyprus Anvil Mining Corporation (which had

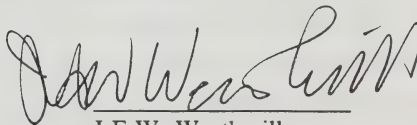
previously been carrying on operations at the property), within the meaning of the Canada Labour Code. The Board concluded, on the facts of that case, that

*"... the facts relating to assets, personnel, know-how and clientele, combined with the long hiatus and the fact that no continuum of the business existed precludes any finding of a sale".*

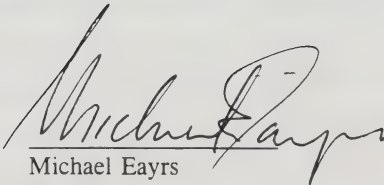
In that case, there was a "hiatus" of some three years, as well as a resort to various "expert third parties to provide the personnel and know-how required to commence operations". As well, in that decision, the Board appears to have emphasised the importance of "continuity" in a way that the Board itself in some cases, other labour relations boards, and the courts have not more recently found appropriate. As was said in Accomodex Franchise Management Inc., *supra*, "the absence of this dynamic quality has been accorded less significance" in recent times. In the instant case, the hiatus was of some two years (the period involved in the New Dominion Stores case, referred to in Accomodex Franchise Management Inc., *supra*). In Curragh Resources and Altus Construction Services Ltd., *supra*, the description of the evidence, and in particular the reference to "expert third parties" might lead to the impression that some sort of "brokerage" operation was involved, and that notion is reinforced by the fact that the application for a successorship declaration was joined with one for a common-employer declaration in that case. In the instant case, while Anvil Range no doubt contracted for certain repair and refitting work, the mining and crushing operations which are the subject of this application are being carried out by Anvil itself. The circumstances of the instant case are, we conclude, significantly different from those which obtained in Curragh Resources and Altus Construction Services Ltd., *supra*.

Applying the principles we have elaborated above, we have found that there was a sale of business within the meaning of section 44 of the Code in the circumstances of the instant case, and accordingly we have declared that such sale occurred, and have issued, for these reasons, our Order dated March 12, 1996.

Having found that bargaining rights are attached to the economic vehicle known as the "Faro minesites" or "Faro operations", we would be remiss not to mention that it would appear (although the point has not been argued, and we make no determination thereon), that given the statements made by counsel at the hearing that although the trade union gave notice to bargain to the new employer no bargaining has taken place, the resolution of the section 50 complaint which is before us should follow from the determination we have made as to the sale of business. Accordingly, the foregoing should be sufficient to allow the parties to resolve the other issues outstanding in these applications. In the event the parties are unable to do so, hearings in the matter will continue.



J.F.W. Weatherill  
Chairman



Michael Eayrs  
Member



Véronique L. Marleau  
Member

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## Summary

Raymond M. Laking, *complainant*, United Transportation Union, *respondent*, and Canadian Pacific Limited, *employer*.

Board File: 745-5215  
CLRB/CCRT Decision no. 1161  
May 6, 1996

## Résumé

Raymond M. Laking, *plaignant*, Travailleurs unis des transports, *intimé* et Canadien Pacifique Limitée, *employeur*.

Dossier du Conseil: 745-5215  
CLRB/CCRT Décision n° 1161  
le 6 mai 1996

The Board is seized of a matter pursuant to section 37 of the Code. It decides that the complaint is untimely pursuant to section 97 of the Code. The complaint was filed on November 1, 1995.

The Board is of the opinion that the complainant knew or should have known of the circumstances giving rise to his complaint on or before January 1, 1995, considerably more than 90 days prior to the filing of his complaint. In effect, the terms of the agreement which was struck between the union and the employer to minimize the effect of a material change in the employer's operations, were known to the complainant when he decided to move to another seniority district. This move was made considerably more than 90 days before filing his complaint.

Le Conseil est saisi d'une affaire fondée sur l'article 37 du Code. Il décide que la plainte est irrecevable en vertu de l'article 97 du Code. La plainte a été déposée le 1<sup>er</sup> novembre 1995.

Le Conseil est d'avis que le plaignant connaissait ou aurait dû connaître les circonstances qui ont donné lieu à sa plainte le 1<sup>er</sup> janvier 1995 ou avant, soit beaucoup plus que 90 jours précédant le dépôt de sa plainte. En effet, une entente avait été conclue entre le syndicat et l'employeur afin de réduire les conséquences d'un changement matériel apporté aux activités de l'employeur, et le plaignant connaissait les modalités de cette entente avant de transférer à un autre secteur d'ancienneté. Ce transfert s'était effectué bien avant les 90 jours précédant le dépôt de la plainte.



Moreover, even if the complaint were timely, the Board would have rejected it, as it did in the Cleghorn case (LD 1478). In circumstances such as are described in the present case, the union is in a no-win situation. The union must represent its whole membership; whichever decision it makes, someone will be unhappy. There was no evidence that the union's conduct of this matter was in any sense arbitrary, discriminatory or in bad faith. For all these reasons the complaint is dismissed.

De plus, même si la plainte respectait les délais, le Conseil l'aurait rejetée, comme il l'a fait dans l'affaire Cleghorn (LD 1478). Dans des circonstances comme celles qui sont décrites dans la présente affaire, le syndicat était dans une situation où il ne pouvait gagner. Le syndicat doit représenter l'ensemble de ses membres; quelle que soit sa décision, il ne peut plaire à tout le monde. Rien dans la preuve n'indiquait que le syndicat avait agi de façon arbitraire, discriminatoire ou de mauvaise foi. Pour toutes ces raisons, la plainte est rejetée.

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## Reasons for decision

Raymond M. Laking,

*complainant,*

*and*

United Transportation Union,

*respondent,*

*and*

Canadian Pacific Limited,

*employer.*

Board File: 745-5215

CLRB/CCRT Decision no. 1161

May 6, 1996

The Board was composed of J.F.W. Weatherill, Chairman and Michael Eayrs and Véronique L. Marleau, Members.

### Appearances (on record)

R. Laking, complainant, on his own behalf; and

Pierre A. Sadik, counsel for the respondent trade union; and

L.G Winslow, for the employer, interested party.

These reasons for decision were written by J.F.W. Weatherill, Chairman.

The complaint in this matter was received by this Board on November 1, 1995. Although it does not expressly so state, it is clearly a complaint of violation of section 37 of the Canada Labour Code. Section 37 reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

The complaint was investigated by a Labour Relations Officer in accordance with the Board's usual practice. On March 22, 1996, the Investigating Officer filed his report, setting out his understanding of the facts of the matter, and attaching the parties' submissions. The matter is now properly before the Board for determination.

Section 98(2) of the Canada Labour Code provides as follows:

*"(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."*

Although the complainant has requested a hearing, the Board is of the opinion that such hearing would not be consistent with the objectives of Part I of the Code. The facts, which are, at least to the extent they are material to the disposition of this matter, uncontested and clearly set out in the Investigating Officer's report.

There is a preliminary issue of timeliness which must be decided with respect to this complaint. Subsections 97(1) and (2) of the Canada Labour Code provide as follows:

*"97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that*

*(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94 or 95; or*

*(b) any person has failed to comply with section 96.*

*(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

While the complaint in this case is one which may be brought under section 97(1), it is clearly subject to the time limit set out in subsection 97(2) - the provisions of subsections (3) to (5) are not material to applications alleging violation of section 37.

Although the complainant asserts that he was not aware of the time limit, it is clearly expressed in the Code, and the Board has no authority to extend it: see Upper Lakes Shipping Ltd. v. Sheehan, [1979] 1 S.C.R. 902. In the instant case, we are of the opinion that the complainant knew or ought to have known of the circumstances giving rise to his complaint on January 1, 1995 (and no doubt well before that), being more than ninety days prior to the filing of this complaint, which is accordingly untimely and must be dismissed. The facts on which this opinion is based will now be described.

The complainant was hired by the employer in 1974, and has been a member of the bargaining unit represented by the respondent trade union at all material times. In June, 1994, the company, as it would appear it was required to do under the collective agreement in effect between it and the union, filed a "notice of material change". The change, which would have adverse effects on employees, involved the sale of the Canadian Atlantic Railway, a wholly-owned subsidiary which the employer had been operating in New Brunswick, the Province in which the complainant then worked.

Service of a notice of material change required the parties - the employer and the trade union - to negotiate certain sorts of measures to minimize the adverse effects of the material change on employees affected thereby. The collective agreement specifically provided that seniority arrangements were among the types of measures which could be negotiated.

Negotiations as contemplated by the collective agreement were held, and a memorandum of settlement was reached on November 11, 1994. Its contents are said to have become common knowledge to the union membership by November 16, 1994. It would appear that the agreement was substantially based on the award of an

arbitrator in a case involving very similar circumstances and arising out of the sale of the Dominion Atlantic Railway. The arbitrator's award had been issued on August 8, 1994.

In any event, the parties to the collective agreement did come to an agreement to minimize the effects of the material change. The complainant alleges that this agreement was not properly ratified pursuant to the union's constitution, but it is doubtful whether an allegation of that nature, relating to the union's compliance with its own constitution, is one which can be said to raise an issue under section 37 of the Code. This allegation, if properly before us, would clearly be untimely, and in any event the material before us does not persuade us either that the union was in violation of its constitution or that in making the agreement it was acting in a manner which was "arbitrary, discriminatory or in bad faith" with respect to the complainant.

The agreement on measures to minimize the adverse effects of material change provided the employees adversely affected by the sale of the Canadian Atlantic Railway (and the complainant was one such: without the agreement it seems clear that he would simply have been laid off, and entitled to the benefits provided for in the collective agreement). Other options were provided under the agreement, however, including an early retirement package, and the possibility of moving to another seniority district, with payment of relocation costs. Employees who moved would not retain the seniority they had accumulated in District 1 (which included the Canadian Atlantic operations), but would be given a seniority date of August 1, 1993 (although their prior service would be retained for vacation, pension and health benefit entitlements). It may be observed that the granting of this seniority date to employees moving to a new district might result in a more recent seniority date for employees, such as the complainant, who move, but that it could adversely affect the exercise of seniority by certain employees already in those other districts.

It is clear that the union sought to act on behalf of all of its members, and to achieve an agreement that would balance all of their interests, which are not identical, in an appropriate way. The agreement was to a large extent based on a similar agreement, dealing with a very similar situation, determined by way of arbitration. When the complainant decided to move to another seniority district, he knew what the terms were, and he made that move considerably more than ninety days before filing this complaint. None of the material before us would support the conclusion that the union's conduct of this matter was in any sense arbitrary, discriminatory or in bad faith. Thus, while the complaint is untimely, we would in any event have dismissed it on its merits.

A similar case (brought in timely fashion), was recently before another panel of the Board (Guy N. Cleghorn, October 27, 1995 (LD 1478)). It is of interest to set out the Board's conclusion, as well as certain cited material included in the decision:

*"After reviewing all the submissions on file as well as the officer's report, the Board has come to the conclusion that section 37 of the Code has not been breached in regard to the union negotiating the changes that it did. In situations such as this, unions have a double barrelled shotgun aimed at their heads. No matter what position they take, someone is going to be unhappy. See Y.B. Poon et al. (1990), 79 di 156; and 90 CLLC 16,011 (CLRB no. 776).*

In Rayonier Canada (B.C.) Ltd. [1975] 2 Can LRBR 196, the B.C. Board had the following to say about conflicts between employees:

*"there is a second group interest in the settlement of grievances which applies even to cases which might succeed in arbitration. while a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well with the employer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration. Rather than relying on the arbitrator's*

*interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the needs of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it:*

*'Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a "right" interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations -- a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise... When the interests of several group conflict, [sic] or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.'*

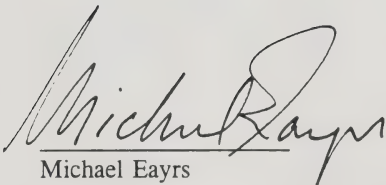
(pages 203-204)

*"There is no evidence that the union acted improperly when it made the agreement it did. The union does not have to be all things to all people, and can perform in the manner it has done so long as its actions are not arbitrary, discriminatory or in bad faith. When the union made the settlement it did, it obviously was aware of the effect on Mr. Cleghorn and others. However, the union had to do what it considered best for its whole membership when it negotiated the settlement."*

What was said by the Board in Guy N. Cleghorn, supra applies equally in the instant case. For all of the foregoing reasons, the complaint is dismissed.

A handwritten signature in cursive script, reading "J.F. Weatherill".

J.F. Weatherill  
Chairman

A handwritten signature in cursive script, reading "Michael Eayrs".

Michael Eayrs  
Member

A handwritten signature in cursive script, reading "V.L. Marleau".

Véronique L. Marleau  
Member



# information

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## Summary

Brian L. Eamor, *complainant*, Canadian Air Line Pilots Association, *respondent*, and Air Canada, *employer*.

Board File: 745-4404  
CLRB/CCRT Decision no. 1162  
May 7, 1996

The complainant was dismissed from his employment as a pilot with Air Canada in March 1992. He filed a complaint with the Board alleging that the respondent Association, through the actions of its representatives, breached section 37 of the Canada Labour Code.

CALPA argued that it did not breach its obligations and that, in any event, the complaint was untimely.

The circumstances that led to the dismissal were brought to Air Canada's attention by the President and Vice-President of the union local to which the complainant belonged. As a consequence, Air Canada conducted a three-month investigation before it ultimately suspended and then dismissed the complainant. The President and Vice-President did not advise the complainant that Air Canada was investigating his conduct, nor did they take any steps whatsoever to enquire into the circumstances or otherwise represent the complainant while Air Canada continued its investigation.

The Board found that the conduct of the President and Vice-President, in bringing the matter to the attention of Air Canada while at

## Résumé

Brian L. Eamor, *plaignant*, Association canadienne des pilotes de lignes aériennes, *intimée*, et Air Canada, *employeur*.

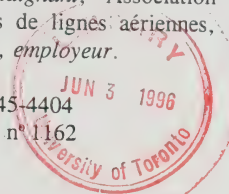
Dossier du Conseil: 745-4404  
CLRB/CCRT Décision n° 1162  
le 7 mai 1996

Le plaignant a été congédié de son poste de pilote à Air Canada en mars 1992. Il a déposé une plainte auprès du Conseil alléguant que l'Association intimée, en raison des gestes posés par ses représentants avant et après son congédiement, avait enfreint l'article 37 du Code canadien du travail.

L'Association allègue qu'elle n'a pas manqué à ses obligations et que, de toute façon, la plainte a été déposée hors délai.

Les circonstances qui ont mené au congédiement ont été portées à l'attention d'Air Canada par les Président et Vice-président de la section locale de l'Association dont le plaignant faisait partie. Air Canada a par la suite tenu une enquête qui a duré trois mois avant de suspendre le plaignant et d'ensuite le congédier. Le Président et Vice-président n'ont pas informé le plaignant qu'Air Canada menait une enquête sur lui ni pris aucune mesure pour connaître les circonstances entourant l'affaire ou pour représenter autrement le plaignant pendant qu'Air Canada poursuivait son enquête.

Le Conseil juge que le Président et le Vice-président, en portant l'affaire à l'attention d'Air Canada et en ne s'assurant pas que le



the same time failing to ensure that the complainant was properly represented, was arbitrary and motivated by bad faith. The arbitrary nature of the union's representation at the outset, and the bad faith that it revealed, continued through the grievance process. Further, the subsequent failure of CALPA to disclose to the complainant the participation of the Local President and Vice-President and its refusal to withdraw from its representation of the complainant through the grievance process put CALPA in a conflict of interest position, which it chose not to rectify even as late as November 5, 1992.

The Board reviewed the ability of the Union choosing between competing members' interests and concluded that CALPA's conduct could not be justified on that basis.

The Board found that, although the events surrounding the circumstances of the case could be viewed as a continuum, the union's conduct over the course of the entire process demonstrated a number of discrete breaches of section 37, each of which, in and of themselves, would give it rise to a timely complaint as envisioned by section 97(2). One of those events was the union's refusal, at a meeting on November 5, 1992, to ensure Earmor's independent representation notwithstanding its obvious conflict of interest. The Board, accordingly, found the complaint to be timely.

The complaint was allowed.

plaignant était bien représenté, ont agi d'une façon arbitraire et ont fait preuve de mauvaise foi. La représentation syndicale qui s'est avérée arbitraire dès le départ, et la mauvaise foi qui s'en est dégagée, s'est maintenue pendant toute la procédure de grief. De plus, l'Association en ne révélant pas la participation du Président et du Vice-président et en refusant de se retirer, à titre de représentant du plaignant lors de la procédure de règlement des griefs, s'est placée dans une situation de conflit d'intérêt qu'elle a choisi de ne pas rectifier, même à la réunion du 5 novembre 1992.

Le Conseil a examiné la capacité du syndicat de choisir entre les intérêts concurrents des membres et il conclut que la conduite de l'Association n'était pas justifiée.

Le Conseil juge que, même si les événements entourant les circonstances de la plainte peuvent être dits continus, le syndicat a fait preuve pendant toute la durée des événements d'un certain nombre de manquements à l'article 37 distincts dont chacun, en lui-même, aurait pu faire l'objet d'une plainte recevable aux termes du paragraphe 97(2). Le refus de l'Association d'assurer à M. Earmor une représentation indépendante lors d'une réunion tenue le 5 novembre 1992 sans tenir compte du conflit d'intérêt évident dans lequel elle se trouvait constitue un de ces événements. En conséquence, le Conseil estime que la plainte a été déposée dans les délais prescrits.

La plainte est accueillie.

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## Reasons for decision

Brian L. Eamor,

*complainant,*

*and*

Canadian Air Line Pilots Association,

*respondent,*

*and*

Air Canada,

*employer.*

Board File: 745-4404

CLRB/CCRT Decision no. 1162

May 7, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chairman, and Messrs. Patrick H. Shafer, and Robert Cadieux, Members.

### Appearances:

Mr. Ross Senior, for the complainant;

Mr. John T. Keenan, Ms. Lila Stermer, Mr. Irwin G. Nathanson, Q.C., and

Mr. Kevin D. Loo, for the respondent; and

Mr. Guy Delisle, for the employer.

These reasons for decision were written by Richard I. Hornung, Q.C., Vice-Chairman.

Mr. Brian L. Eamor, the complainant, was dismissed from his employment as a pilot with Air Canada on March 31, 1992. On January 12, 1993, he filed a complaint with

the Board alleging that the respondent, the Canadian Air Line Pilots' Association (hereafter "CALPA" or the "union"), through the actions of its representatives, both prior and subsequent to his dismissal, breached the provisions of section 37 of the Canada Labour Code.

## II

Brian Eamor joined Air Canada as a pilot in 1972 and was promoted to the position of captain in 1980. The majority of his career as captain has been spent on DC-9 aircraft. Until 1986, he was based in Montreal. In that year, he was assigned to Air Canada's Winnipeg flight operations. He took up residence in Vancouver and commuted to work. At times material to this complaint, the Winnipeg base employed approximately 150 pilots.

Evidence at the hearing indicated that Eamor was a conscientious and enthusiastic pilot. The assessments of his flying and technical efficiency uniformly produced the highest attainable ratings. Until the circumstances giving rise to this complaint, his employment record was entirely free of any disciplinary action.

Until 1986 the complainant devoted all of his time to flying. His move to Vancouver, however, signalled a change in direction. The facts in that respect are perhaps best described in the arbitral decision rendered with respect to Eamor's dismissal:

*"... When he (Eamor) moved to Vancouver he became involved in the activities of various companies whose shares were trading on the Vancouver Stock Exchange. He also became involved in marketing so-called 'flow through' shares, whose features included some income tax deductibility. One of the Grievor's primary sources of business opportunity in these areas was Air Canada pilots. At one point in time some 55 pilots based in Winnipeg had purchased shares as a result of the Grievor's efforts. The market was generally strong in 1986 and until the October 1987 crash. The Grievor came to conclude that his popularity among those pilots*

*with whom he was doing business was a direct function of the state of the stock market. His general reputation within the pilot group was also affected by his active involvement in the securities business.*

*As the market fluctuated and, more particularly, as it fluctuated downward, rumours circulated within the pilot group that the Grievor had become wealthy from stock market activity. There was also some speculation that his wealth may have been accumulated at the expense of other pilots who had lost as a result of their purchases.*

*As the rumours evolved and even included threats of physical reprisals, they soon reached the Grievor. He came quickly to understand that while doing business with one's professional colleagues has many obvious advantages, its disadvantages are equally obvious and much more difficult to endure. This is particularly so in a professional group that works intimately together in circumstances where each is highly dependent upon the other. As time went by, the pilot group was apparently divided in the view they had of the Grievor and his stock market activities. ..."*

(Arbitral Award of Paul D.K. Fraser, Q.C.; October 29, 1993; pages 4-5)

Certain pilots who were members of CALPA lost substantial sums of money in the stock dealings promoted by Eamor. These persons included Captain Paul Hitchman, the former Chairman of the Local Executive Council (LEC) 7 in Winnipeg, and First Officer Colin Ward, Vice-Chairman of LEC 7. Many of the pilots, including Hitchman and Ward, blamed Eamor for their losses. The acrimony that this created at the Winnipeg base was palpable and Eamor's relationship with a significant segment of the pilots at the Winnipeg base became strained.

In 1991, Air Canada began a "winning seat" program. Through this program Air Canada, in an effort to encourage people to use its services, would award prizes to passengers who were randomly selected as occupying a "winning seat". The prizes awarded ranged from "frequent flyer" points to two tickets for any Air Canada destination. When pilots were assigned their flight schedules for a given period, they

were provided with envelopes which contained the winning seat number for each flight. The envelopes were only to be opened by the pilots after the flight was en route.

At about this time Eamor, awash with his experience in the stock market; his absence from his residence; and the strained relationships which he was experiencing with other pilots; became, as he described it, "bullet-proof". In approximately June 1991 he met a woman with whom he had a relationship. Eamor arranged for her to purchase a ticket on the December 6, 1991 flight from Edmonton to Vancouver and advised her in advance to request a specific seat which he knew would be the "winning seat". On that flight he awarded the "winning seat" prize to her. Without intending to minimize Eamor's conduct, there is no need to detail the circumstances further considering the focus of our enquiry.

The First Officer on the flight, Bruce Cameron, eventually became aware that Eamor had orchestrated the selection of the winning seat prize. He testified that he was concerned that there might be ramifications for him if he did not bring it to someone's attention. It is apparent that word of Eamor's escapade got around quickly. Eventually Ward and Hitchman became aware of it and, on December 28, 1991, they met with Cameron in Calgary and discussed the circumstances of the "winning seat" episode. It was no secret that Hitchman had a lingering hostility towards Eamor. In point of fact, Hitchman personally caused the Manitoba Securities Commission to conduct an investigation into Eamor's stock market activities.

Spurred on by Hitchman and armed with the information provided by Cameron, Ward met with CALPA's Chairman of LEC 7, Captain Merv Kuruluk. Ward testified that in their discussions, his concern was "to look after Bruce Cameron's interests". Kuruluk, after speaking with Ward, decided that they should get an investigation going by Air Canada. According to Kuruluk: if they did that, Air Canada would determine the facts and that would protect Cameron; if there was nothing to it -

everyone would be fine; if it was true, after investigation, CALPA would then represent Eamor.

Following their meeting, they decided that Cameron's best interests would be served by taking up the matter directly with Captain Richard Joyce who was then the Acting Flight Manager in Winnipeg. Early in January 1992 they met with Joyce. They told him about the "winning seat" episode. Joyce indicated that he considered the matter to be very serious and requested more details. They provided Joyce with the flight numbers, the dates, and the names of the individuals involved. Joyce told them that he would institute an investigation. In fact, after Kuruluk and Ward met with Joyce, Air Canada initiated an investigation into the matter, and obtained statements from all of the parties involved, except Eamor. On January 3, 1992, Joyce met with Cameron to obtain further information. On January 12, 1992, Cameron spoke with Kuruluk and was advised that Joyce was still investigating the incident. Kuruluk assured Cameron not to worry ... "I haven't forgotten about you".

In his testimony before the Board, Kuruluk conceded that as Chairman of LEC 7, it was his duty and obligation to represent fellow CALPA members in grievance matters pursuant to the terms of CALPA's Grievance Checklist (Exhibit 42). That Checklist states in part:

*"Generally, a Council Grievance Chairman becomes aware of a potential grievance by personal contact with the griever. The individual would probably relate his or her story to the Grievance Chairman, and it is at this point that the grievance process usually begins. Before initiating the process, try to determine if it is indeed a grievance, or a pay claim. If the problem is a pay claim related, refer the person to the Pay Claims Chairman at your base. If after the initial interview it has been determined that a grievance exists, proceed as follows:*

...

*3. Fully investigate the grievance. Ask the griever(sic) to write down all the facts with times and dates, and keep a copy in your file. Review the Agreement and try to determine specific articles*

*that have been violated. Contact the CALPA IRD Contract Administrator with all details for an opinion on the merits of the grievance. Refrain from contacting individuals on MEC Committees for opinions, as the Contract Administrator is best equipped to give advice, and he will in turn contact whomever for further clarification if required. Copy IRD and LEGAL on all correspondence.*

*4. Determine if the grievance is an Article 28 - Contract Interpretation, or an Article 29 - Discipline or Discharge grievance. If Article 29, contact your local Pilot Advisory Chairman for input. It may be prudent to suggest the griever have a medical. If in doubt contact the MEC Chairman or the MEC Grievance Chairman.*

...

*7. Attend the hearing with the griever. If the individual is proceeding on their own without CALPA support, the Union still has an obligation to offer assistance during the procedures. The griever may ask you to plead his case at the hearings. If he/she prefers to make the presentation, your job is to make sure the rights of the member are not compromised by Company officials. If in doubt, ask for a recess to determine the views of the griever."*

(Exhibit 42, emphasis added)

Notwithstanding the gravity of the matter and the severe consequences that might result, neither Kuruluk, Ward or anyone else in CALPA questioned Eamor about the matter or even advised him that an investigation into his conduct was taking place.

On March 27, 1992, at 11:38 a.m., when Eamor deboarded his flight in Winnipeg, he was met by Captain Vic Cyr, Air Canada's Acting Flight Manager and Captain Jim Curran, CALPA's representative. Cyr handed Eamor a letter of suspension pending the completion of an investigation by Air Canada (Exhibit 12-V). Arrangements were made for Curran and Eamor to meet further with Cyr at 1:00 p.m. Although Eamor had received a telephone call from Captain Ken Green suggesting that Air Canada was looking into his "winning seat" escapade - a warning which he let pass because neither Kuruluk nor Joyce raised it with him when he encountered them subsequently - this was the first occasion where he had been formally apprised of Air Canada's investigation.

Having received the letter, he sat in the Winnipeg waiting area with Curran who showed him documents relating to the investigation. Curran did not discuss anything else with Eamor at that time. He did not make any enquiries to determine the circumstances of the case; he did not share any information that CALPA had; he did not enquire after any details nor did he advise or assist Eamor with what was to happen at the 1:00 o'clock meeting. He simply sat there for approximately 30 minutes and watched Eamor read the documents which outlined the details of the Air Canada investigation. After Eamor finished reading the documents, Curran asked if he should attend the meeting at 1:00 p.m. Eamor replied "yes" and they went their separate ways. They met again at Cyr's office at 1:00 p.m.

Prior to this meeting Curran confessed that he had no previous experience in disciplinary matters and that, in fact, this was the first occasion on which he assisted anyone in a representational capacity. At the hearing we were told that this was the first occasion on which an Air Canada pilot, like Eamor, was dismissed. Considering the severity of this matter, and considering the terms of CALPA's Grievance Checklist (Exhibit 42), Curran's lack of experience and Kuruluk's absence are not insignificant.

At the 1:00 o'clock meeting Cyr and Captain John Sturdy, Manager of Flight Operations, represented Air Canada. The meeting lasted approximately twenty minutes. It was agreed that Eamor would return on March 31st to be informed of the outcome of Air Canada's investigation. Eamor told Curran that he believed this turn of events had to do with his stock market problems. Curran said he would look into it and left without further discussion.

On March 31, 1992, the same four people met again in Winnipeg at 1:00 p.m. Cyr provided Eamor with his letter of termination (Exhibit 12-VI). At this point Eamor gave up his travel passes, identification, and surrendered his other paraphernalia of office to Cyr. The meeting ended at 1:20 p.m.

After the meeting Curran told Eamor that he had looked into whether Eamor's stock trading was behind the events that led to his dismissal and advised Eamor that he discovered that: "there was cause for concern". At that stage, inexplicably, Curran gave Eamor the option to resign and told him that it might be in his best interests for him to do so. Eamor's response was to, then and there, write a letter indicating that he would grieve his dismissal. Thereafter, Eamor returned home to Vancouver.

Following his return to Vancouver, Eamor received two calls from Sturdy who wanted to know if he intended to resign, and gave him 48 hours to make up his mind. In addition to Sturdy's calls, Eamor received a call from Captain Gary Dean, the Chairman of CALPA's Master Executive Council (MEC). Dean inquired whether or not he needed any "medical assistance" - which Eamor took to mean whether or not he required sleeping pills - and also raised the question of Eamor's resignation. Eamor prevailed upon him to ask for five days to consider the resignation offer. Later, Dean advised that he had obtained the extension. Dean also advised Eamor that if he did not resign he would have to file his own grievance and should he do so, he would have to do a lot of the work himself. After speaking to various lawyers, Eamor retained Mr. Alan Finlayson on April 14, 1992, to act on his behalf and an appropriate grievance form was filed.

The next occasion that CALPA was called upon to represent the complainant was at the Step I hearing.

Although the agreement between the parties requires that the hearing be held at the home base (which in this case was Winnipeg), the Step I hearing in Eamor's case was set for Toronto on May 19, 1992. During the course of the Board's hearing, we were advised that CALPA has an agreement with Air Canada whereby it can request passes from Air Canada for CALPA "business" - which includes arbitration hearings held for its members. However, in May 1992, when Eamor requested assistance in travelling to Toronto, he was advised by Dean that that assistance was not forthcoming from CALPA and that he, Eamor, would have to pay his own fare.

The meeting was held in Toronto. The complainant was represented by Captain George Cockburn, the MEC Grievance Chairman, and Dean. Air Canada was represented by Captain W. A. Wilford, Director, System Flying Operations, and Captain Sturdy.

It is apparent that no advance preparation was done by CALPA in anticipation of the Step I meeting. Eamor met briefly with Dean immediately prior to the meeting and asked him whether it was true that CALPA representatives had "turned him in" to Air Canada. Dean denied it. Eamor produced a letter which had been prepared by his counsel (Exhibit 37). Dean was opposed to the presentation of any documents at Step I; he nevertheless reviewed it and suggested that a small change be made. Although Cockburn was Grievance Chair, he only had a brief discussion with Eamor prior to the Step I hearing. According to Eamor, the discussion did not include anything of substance relating to his grievance. For his part, Dean advised that he viewed his position at the meeting to be one of a "referee".

The Step II grievance was scheduled for June 17, 1992 and, once again, did not take place at the home base in Winnipeg but rather in Montreal. Again, Eamor was not provided with any assistance by CALPA to attend the meeting. In fact, he was given short notice of the meeting and he requested that, at a minimum, the matter be delayed to enable him to obtain an economy fare seat to Montreal. This did not happen. He was told by Dean that if he wanted a Step II hearing "he'd better be there". Dean did not attend the meeting. Cockburn attended alone. Eamor met with Cockburn an hour in advance of the meeting and again produced another document that he had prepared (Exhibit 38). Eamor essentially presented his own case at this hearing.

As at Step I, CALPA made no attempt at the Step II grievance hearing to put forward any mitigating factors or the complainant's unblemished disciplinary record. The complainant himself had to insist on putting his unblemished disciplinary record before the employer. Cockburn did not speak on his behalf and when asked by C. H.

Simpson, Air Canada's Executive Vice President of Operations, if CALPA supported the document (Exhibit 38), Cockburn answered "no".

Following the Step II meeting, CALPA, through Dean, took the position that Eamor ought not to proceed to Step III and should, instead, go directly to arbitration. At this stage it became apparent to Eamor and his counsel that CALPA was not prepared to readily assist them nor provide information which they felt was necessary to use in his defence: see Exhibit 19-111, 19-109. Although a plethora of paper passed between CALPA and Eamor's counsel, it did not provide Eamor with information or assistance. Rather it produced an elaborate paper trail which, while attempting to excuse or rationalize the conduct of the union, served only to obfuscate, delay and jeopardize Eamor in the prosecution of his grievance.

Alan Finlayson testified at the hearing. He indicated that early on after his retainer, he received the assistance necessary to file a grievance on behalf of Eamor. It was his view that initially CALPA, including its counsel, was assisting him. However, his relationship with CALPA deteriorated over time. The relationship particularly degenerated after Finlayson told Mr. John Keenan, counsel for CALPA, that it was CALPA people that turned Eamor in. That statement, although obviously true, was nevertheless vehemently denied.

Finlayson formed the conclusion that Captain Eamor's interests were not CALPA's prime concern. In his words "counsel for CALPA was wearing two hats in this matter, and the CALPA hat was much larger than the Eamor hat". The more it became apparent that CALPA was involved in the original complaint against Eamor, the less cooperation Finlayson got from the union. Finlayson formed the conclusion that CALPA was not fairly representing Eamor's interests and that, because of what he perceived as its obvious conflict of interest, CALPA should only continue in its representation of Eamor under strict guidelines. In that respect Finlayson's law firm sent a letter to CALPA's counsel on September 15, 1992, which stated in part:

"...

*Please be advised that we are prepared to hold out to CALPA an 'olive branch' to settle our differences in an attempt to assist Captain Eamor as much as possible.*

*Regardless of paragraph 1 of your letter, it is abundantly clear that our client cannot today be expected to have any confidence in CALPA or any feeling of assurance that CALPA will act in his best interest and with a determined goal to ensure his reinstatement by the company.*

*However, our client is prepared to accept without prejudice your letter at face value and to cooperate with CALPA in return for its cooperation to obtain the said goal of his reinstatement. Our client however must see some 'good faith' from CALPA. The good faith that our client must see is the following:*

- 1. He must be represented at the Step III grievance hearing by the following:*
  - A. Don Johnson, CALPA Chairman from Montreal;*
  - B. John Watt, LEC member, Toronto, Ontario;*
  - C. John Keenan, solicitor; and,*
  - D. Ken Green, as Pilot Advisor.*
  - E. Captain Gary Dean can sit in the hearing however he is not to be noted as representing Captain Eamor.*
- 2. The hearing set for September 18, 1992 be adjourned at least 2 weeks. That there be a meeting at least 3 days prior to the hearing in Vancouver, B.C. between the aforementioned Don Johnson, John Watt, John L. Keenan, Ken Green, Captain Eamor and our firm to discuss a comprehensive and cohesive presentation and defence on behalf of Captain Eamor at the Step III hearing and with a view to the possibility of a subsequent arbitration hearing;*
- 3. That either the Step III grievance hearing be heard in Vancouver or Captain Eamor's way be paid by either CALPA or the company to Winnipeg for the hearing;*
- 4. The representation of Captain Eamor at the Step III hearing entail arguments of substance by not only John Keenan but there be voice support by Don Johnson, John Watt and Ken Green to Air Canada at such hearing;*

*It is our client's position that we receive from your firm on behalf of CALPA a letter agreeing to the good faith matters aforementioned with a time table as to when those matters will be completed. Our client does not feel that a five minute social gathering prior to the hearings as has happened previously either amounts to or constitutes representation. As well, at the hearing itself, our client requires that his representation entail more substance than simply requesting a five minute coffee break.*

*As aforementioned our client is prepared to cooperate with CALPA. In turn, we require some good faith on the part of CALPA to show openly and strongly that it is there to represent, defend and fight on behalf of Captain Eamor to attain his reinstatement.*

*We would request that you reply to our letter forthwith in order that we can discuss our client's strategy with him concerning the upcoming Step III hearing."*

(Exhibit 19-82)

Counsel for CALPA's response is contained in a letter of September 23, 1992 (Exhibit 19-76), portions of which are reproduced below:

"...

*So far, it is our opinion that CALPA has not in any way acted in a manner that is arbitrary, discriminatory or in bad faith in the representation of Captain Eamor with respect to his rights under the Air Canada/CALPA Collective Agreement.*

...

*Right from the beginning this grievance has been handled at the highest levels of the Association's Air Canada representatives. Captain Dean himself, the Chairman of the Air Canada pilots' Master Executive Council, became involved in the case from its outset. This, of itself, is unusual and indicative of extraordinary representation. Captain Dean has had numerous lengthy conversations with Captain Eamor and travelled to Vancouver to meet with him.*

...

*Article 29.05 of the Collective Agreement provides as follows:...*

*Article 29.06 then provides:*

*'Throughout this procedure, the pilot or pilots involved shall have the right to elect to be represented by the Association and shall be given full opportunity to adduce evidence, make representation, and present, examine or cross-examine witnesses.'*

*From these provisions it is clear that at internal Company steps, including Step 3, the pilot holds the right of appeal and also the right to elect to be represented by the Association. We assume that if he has the right to elect to be represented by the Association he also has the right to elect not to be represented by the Association.*

*Please be advised that the Association is fully ready and able to properly represent Captain Eamor at Step 3 of the grievance procedure should he elect to be represented at that Step by the Association. Such election entails that, commensurate with the Association's duty to act in good faith, the Association, in consultation with Captain Eamor, will choose the representatives to attend on behalf of the Association and, therefore, on behalf of Captain Eamor, and will determine the strategy to be taken, again in consultation with Captain Eamor, as well as the witnesses and evidence to be called and presented and the venue.*

*...*

*Should, however, for whatever personal reasons may motivate him, Captain Eamor elect not to be represented by the Association at Step 3 but rather to be represented by Captain Watt, Captain Green and/or Captain Johnson, that is Captain Eamor's right and we will not interfere with his choice. The right to election is his.*

*We would point out to you, however, that following Step 3 should Captain Eamor not be successful in obtaining a satisfactory decision, including his reinstatement, the next step is arbitration and the initiation of that step is governed by Article 29.07 of the Collective Agreement which provides:*

*'Where the procedures outlined in Article 29.05 have been exhausted, the Applicant may initiate the arbitration procedure in accordance with Article 30 within thirty (30) days of receipt of the final Company decision.'*

*The use of the term 'Applicant' as opposed 'Association' in that paragraph as well as the use of the term 'appellant' in Article 30.05 means that a case may either be submitted to arbitration by the Association or may be submitted to arbitration by the grievor.*

*If the grievor chooses to proceed to arbitration himself through his chosen representatives rather than the Association, then the Association makes the procedure available to him through necessary appointments, etc., but the costs of representation are borne by the grievor. If the grievor requests to be represented at arbitration by the Association, then the Association reserves two specific rights:*

- 1. the right to refuse to proceed to arbitration on the grievor's behalf after a thorough examination of the factual and legal aspects of the case, in which case the grievor can himself proceed to arbitration as mentioned above, and,*
- 2. should the Association proceed to arbitration, then the Association retains the right, in full consultation with the grievor, to maintain carriage of the case and determine strategy, venue, evidence, witnesses, etc., as well as who will represent the Association and, through the Association, the grievor.*

*If you decide to proceed on your own at Step 3, this might impact on whether the Association will carry the case at arbitration.*

*We thus ask, through you, Captain Eamor to clearly make his choice and elect whether he wishes to be represented at Step 3 by the Association or by other persons, as mentioned above, and to indicate to us at his earliest opportunity his election in this matter."*

(Exhibit 19-76)

Although the letter from Eamor's counsel is pointed and direct, the lengthy reply from CALPA is not responsive. It nevertheless underscores the fact that the relationship between counsel for Eamor and CALPA deteriorated markedly over the course of time between their initial contact and prior to the Step III hearing.

Finlayson's testimony was direct; as were his pointed accusations of union obfuscation and deficient assistance which he described in testimony and supplemented by Exhibit examples including Exhibits 19-111, 19-108, 19-97, 19-89, 19-84, 19-82, 19-76.

Finlayson's evidence was uncontradicted. Although the Board adjourned to allow CALPA's counsel, Mr. Keenan, to withdraw and be replaced in order to testify and refute the statements made by Finlayson, no testimony was given. Nor did Captains Dean, Curran or Cockburn testify.

Following receipt of CALPA's response in Exhibit 19-76, above, Finlayson's firm referred Eamor to a prominent Vancouver labour lawyer, Mr. Morley Shortt, Q.C. After Shortt agreed to accept Eamor's retainer, he made an attempt to get Eamor's case "back on the rails". Shortt wrote to CALPA on October 13, 1992 confirming his retainer, outlining his concerns regarding CALPA's conduct, and requesting assistance in certain areas which he considered necessary for Eamor's case. Portions of the letter, Exhibit 19-73, warrant repeating here:

*"This is to confirm the advice given to you by letter dated September 25, 1992, from Jones McCloy to Mr. Keenan that the writer had been retained to act for Captain Brian Eamor in respect to his termination from employment by Air Canada and the handling of his grievance by C.A.L.P.A.*

*1. ACTION REQUIRED*

*We require:*

- (a) C.A.L.P.A. to immediately conduct Step III of the grievance procedure in the manner set out in the Jones McCloy letter of September 15, 1992, to Mr. Keenan.*
- (b) If Air Canada does not thereafter return Captain Eamor to his employment with restitution of all benefits, C.A.L.P.A. shall immediately proceed to arbitration on behalf of Captain Eamor, and appoint the writer to act as counsel and conduct the arbitration case on his behalf. C.A.L.P.A. shall pay all reasonable fees and disbursements.*

## 2. CLAIM FOR REPRESENTATION

*Our position is that there is abundant evidence that C.A.L.P.A. has failed to represent Captain Eamor as required by Section 37 of the Canada Labour Code. In his letter of September 23, 1992, to Jones McCloy, Mr. Keenan argues that C.A.L.P.A. has fulfilled its duty to him.*

*We are ready and willing to apply to the Canada Labour Relations Board under Section 37 to have that tribunal resolve the matter. This would, however, be resorting to the adversarial attitude that Mr. Keenan implores us not to continue with in paragraph 6, page 3 of his letter of September 15, 1992 to Jones McCloy. Accordingly we will not reiterate at this time the facts we would include in such an application nor make argument on the authorities cited under Section 37.*

*We must, however, take issue with Mr. Keenan's analysis of Articles 29 and 30, of the collective agreement in his letter of September 23, 1992, pages 2, 3, and 4. With respect, we suggest that:*

- (a) Section 29.06 means only that 'as against' the Employer, the pilot has the right to be represented by the Association.*
- (b) Where the word 'applicant' is used in Section 29.07 and the word 'appellant' is used in Section 30.05, rights are created which the pilot may enforce, through the bargaining agent, which is party to the collective agreement.*

*We know of no authority which supports the position you suggest that C.A.L.P.A.'s duty under Section 37 can be brought to an end by compelling the pilot to make the election Mr. Keenan describes.*

## 3. MERITS OF THE CASE

*You should consider our position in light of the merits of this case. Does anyone in C.A.L.P.A. really believe that termination is an appropriate response by the Employer in these circumstances?*

## 4. SUMMARY

*We would like the opportunity to meet with Captain McInnis and Mr. Keenan, or any other persons or body you may suggest to discuss this matter. Since the Stage III grievance hearing set for*

*September 18, 1992, was adjourned, it is urgent that hearing and the arbitration proceed without delay.*

*In his letter of September 23, 1992, to Jones McCloy, Mr. Keenan notes that he and his firm bring scores of years of experience to bear on this matter. Gentlemen, we as well have spent our entire careers representing major trade unions in disputes with their Employers many of whom operate in the Federal jurisdiction.*

*We assure you that we have given this matter serious consideration and are able to take the matter forward responsibly on Captain Eamor's behalf. At the same time we will care for C.A.L.P.A.'s interests in any manner which you may suggest. At this stage, the enemy is the employer, Air Canada. The remedy we seek is against that Employer. This is the attitude that Mr. Keenan urged upon us and we are acting in accord with that spirit. It is only if you decline to accept our offer to resolve the dispute in the manner we suggest in this letter, we would be required to proceed with an application to the Canada Labour Relations Board.*

*Please contact us within 7 days of receipt of this letter."*

(emphasis added)

On October 28, 1992, counsel for CALPA responded. The response included the following excerpts:

*"Accordingly, we take it that this expresses Captain Eamor's position that he does not elect to be represented by the Association at Step III and that, should there be an arbitration, he will proceed to arbitration as 'the Applicant'.*

*We are somewhat confused by this position since on October 15, 1992, at the request of Captain Eamor, CALPA's Senior Director of Industrial Relations, Mr. Ronald Young, met with him and Captain Eamor expressed the opinion that he would agree to Mr. Young handling his case at Step III.*

*We will respect Captain Eamor's choice in this matter but would point out, again, that at no time did we refuse to properly represent Captain Eamor at Step III or, should there be an arbitration, at arbitration.*

*We reiterate our position that if Captain Eamor chooses to proceed to arbitration, or indeed to Step III himself through his chosen representatives rather than through the Association, that the Association will make the procedure available to him but the costs of representation are to be borne by him."*

(Exhibit 19-67)

Notwithstanding the terms of the above letter, counsel for Eamor continued in his efforts to amicably resolve the representational differences with CALPA. With that goal in mind a meeting was held on November 5, 1992, at Finlayson's office. Present were: Mr. Keenan, Messrs. R.J. McInnis (President of CALPA) and Cockburn on behalf of CALPA, and Messrs. Shortt, Finlayson, Bobbert and Eamor. The purpose of the meeting was to explore what CALPA would do on behalf of Eamor and whether, in the circumstances, it would continue to represent him.

Eamor's uncontradicted evidence was that at that meeting Mr. Keenan indicated that although he (Eamor) was not treated right by CALPA, they would take care of him now. Eamor, however, made it clear at the meeting that: given the fact that CALPA, through its President, Vice-President and past President at the Winnipeg base, was intricately involved in having turned him in to Air Canada; and, given the fact that no attempt was made to assist him between the time the investigation commenced and the time he was dismissed; and, given the fact that he now believed that he was being "sand-bagged" by CALPA, he no longer wanted CALPA to represent him.

Shortt testified that his request, as per Exhibit 19-73, that CALPA pay Eamor's legal fees and disbursements was raised again at this meeting and refused by those present and representing CALPA. Although they agreed to pay one half the arbitrator's fees, they remained adamant that CALPA would represent Eamor and that if he chose not to accept that offer, he would be required to pay all expenses, legal or otherwise.

At the conclusion of this meeting, CALPA was for all intents and purposes removed from the direct representation of Eamor. Although there was previous correspondence which passed between Shortt and CALPA or its counsel, dealing with the representational question and the liability of the union to pay the costs of the same, these were exchanged while Shortt pursued a "settlement" in this respect with the union. From the perspective of Shortt and Eamor, CALPA's definitive position that it would not agree to the terms of Shortt's October 13, 1992 letter, was delivered at the meeting on November 5, 1992.

Following that meeting, and its unacceptable conclusion, Shortt wrote to CALPA on November 9, 1992 (Exhibit 19-61) and informed them of his client's intention to proceed with a section 37 application.

In order to assist him at the Step III hearing, Eamor requested that CALPA require Captain Peters, Head of Pilot Advisory Program in Winnipeg, to testify on his behalf. A letter requesting the attendance of Captain Peters was sent to CALPA (Exhibit 57). On November 26, 1992, Eamor received a letter, purportedly written by Peters, in which he declined to attend the Step III hearing (Exhibit 56). However, in his testimony, Peters stated that he did not in fact write the letter of refusal and that the same was written by counsel for CALPA. Earlier requests had been made to interview Captains Kuruluk, Ward, Cameron and Hitchman. Those requests were declined by CALPA: see Exhibits 19-111 and 19-108.

The Step III hearing occurred on November 29, 1992, in Winnipeg. At that meeting, Eamor was represented by Captain Ken Green and Captain John Watt; Air Canada by Mr. R. M. Tritt, Air Canada's Director of Labour Relations, Captains Sturdy and Cyr. The hearing lasted 5 hours and, according to Eamor, was the best hearing he had.

On December 9, 1992, Air Canada responded to the Step III hearing; it denied the grievance and upheld the discharge. On December 16, 1992, Eamor initiated the

arbitration procedure in accordance with the provisions of the collective agreement.

The grievance-arbitration of the matter commenced on May 17, 1993 and continued intermittently over a period of 11 more days concluding on July 29, 1993. More will be said of this later.

On October 29, 1993 the Arbitrator rendered his award dismissing Eamor's grievance. Although CALPA refused to appeal the Arbitrator's decision, Eamor did so directly and the matter presently awaits a Judicial Review hearing by the British Columbia Supreme Court.

### III

Much was said at the hearing about the Pilot Advisory Program in existence at Air Canada when the events surrounding Eamor took place. The purposes of the Pilot Advisory Program, and the responsibilities of its committee, are set out in the CALPA Administrative Policy Manual (Exhibit 41) as follows:

#### *"Subsection C - Pilot Advisory Responsibilities and Policy*

##### *1. Pilot Advisory Committee Organization*

*The responsibilities of the Pilot Advisory Committee Chairmen and members are as follows:*

- (a) To provide peer support to the fellow employee with a problem.*
- (b) To act as a referral agent in directing the employee to the appropriate professional resource.*

- (c) *To hold in the strictest confidence the entire problem matter presented.*
- (d) *To assist the fellow employee, where necessary, in achieving and maintaining the high standard required for the pilot profession.*
- (e) *To be aware that its constructive purpose could easily be defeated through inept use of its prerogatives; Pilot Advisory Committee members must therefore act with extreme discretion, tact and restraint. "*

As reflected in the minutes below, the program, and the obligations of the members of MEC who are expected to avail pilots of it in the appropriate circumstances, was described to the members of the Master Executive Council at a meeting in Toronto on October 22, 1992:

*"D.3 f) 1000 Hours October 22nd, 1992 - Rev. B. Murray and Captain D. Noble - Presentation on Pilot Assistance Facilities  
Captain Noble gave the background of how the Pilot Assistance Program was developed and stated that Captain R.A. C. Dennis was the person responsible for its development. He explained that this program was developed as a peer group of pilots to help other pilots who were experiencing various problems. Examples were given of some of the problems dealt with by this group.*

*Captain Noble gave details of how the EAP Program was formalized with an agreement reached between CALPA, Air Canada and the Medical Department in 1984. The MEC were told that a copy of this agreement has been distributed to all pilots and were given details of how this program is broken down, i.e. life style problems etc. Information on the professional help available to individuals taking part in this program was covered.*

*Captain Noble outlined his own involvement with this group over the years and also how Rev. Brian Murray became involved with CALPA, and in particular this group.*

*Rev. Murray gave a breakdown of what he basically does for the pilot group and gave examples of the assistance he offers to individual pilots. He, like Captain Noble, covered the details of how the Pilot Assistance Group developed from an underground movement to a neutral group between CALPA and management.*

*He stressed that before any termination of a pilot, the pilot should be offered the chance for an assessment to see if there is any other underlying problem responsible for the professional problems the pilot is experiencing."*

(Exhibit 23, emphasis added)

It is clear from the evidence of a number of witnesses, including Captains Green, Watt and Sturdy, that in the circumstances Eamor should have been referred to the Pilot Advisory Program at the time that the complaint was made known to the union. In fact, Doctor Lowell Leifso, Air Canada's Medical Director for the Western region, testified that, in his opinion, referral of Eamor to Pilots Advisory should have occurred at the outset. Sturdy, in his testimony, acknowledged that in circumstances where a pilot is "in trouble", the first line of support is for CALPA to step in and try to fix it, often without management even knowing about it. He indicated that he believed Eamor should have had a "medical" before his dismissal. He stated: "I was surprised that CALPA did not ask for a medical and that Dean did not want one". Finally, Captain Peters testified that he was aware of how the complaint with Air Canada originated and, in his view, Pilots Advisory should have been brought in at that stage.

We were also made aware of instances where, through the Pilot Advisory Program, CALPA protected its pilots from any disciplinary action by pulling the pilot off the line and referring him to Medical Evaluation before Air Canada even became aware of the matter. In addition, Larry Joncas, the District Chairperson of CAW, testified regarding a similar situation where one of CAW's members received a "winning seat" ticket in breach of Air Canada's policy. Faced with Air Canada seeking a dismissal, and, having been brought in at the outset, the union was able to mitigate the

consequences down to a letter of reprimand on the file. Albeit the circumstances of Eamor's breach may be considered more severe, it nonetheless brings home the impact, and the possible result that could be achieved, with Air Canada when the union is involved on behalf of the employee at the outset.

Both Kuruluk and Ward were aware at the time they spoke to Captain Joyce that the matter would be taken very seriously by Air Canada. Ward knew that reporting the matter to Air Canada, as he did, would "injure Captain Eamor". Once they were aware, as they must have been following their meeting with Captain Joyce, that termination could take place, it was incumbent upon them as CALPA officials, in keeping with the guidelines of Exhibit 23 above, to bring the matter to the attention of Pilots Advisory.

A great deal of hearing time was spent with testimony regarding whether or not Eamor was given an opportunity, between the time that he was dismissed and the date of his arbitration hearing, to avail himself of the benefits of the Pilot Advisory Program. In many respects the debate and conflicting evidence in that regard is a red herring. What is germane and undisputed is that the union's officers made no attempt to refer Eamor to the Pilot Advisory Program prior to his termination, when such a referral was critical.

The period of time where a referral to Pilot Advisory could have benefitted Eamor most, according to the evidence and the union's own documents (Exhibits 23 and 41), was between December 1991, when Ward and Kuruluk became aware of his circumstances, and March 31, 1992, when the determination was made by Air Canada to dismiss him. It is apparent that the very purpose of the Pilot Advisory Program was to provide assistance and guidance so as to avoid a member's dismissal. Therefore, whether or not CALPA made the necessary attempts to provide Pilot Advisory to Eamor after his dismissal, or even whether at that stage it could have been of assistance to him, became largely academic. Had either Kuruluk or Ward followed the union's own policy regarding Pilot Advisory, they should have, at a

minimum, advised Eamor of the investigation and referred him to the program immediately. The fact that during this period CALPA's officers said nothing to Eamor, did nothing to assist him, and abdicated their responsibility to investigate the incident and to represent Eamor, speaks volumes about CALPA's arbitrariness and lack of good faith.

#### IV

This Board has neither the jurisdiction nor the inclination to question the decision of the Arbitrator in Eamor's case. We draw no conclusions as to whether Eamor's involvement in the "winning ticket" episode was deserving of the penalty imposed or whether a lesser penalty was warranted. Nor, for that matter, is it determinative that Eamor's grievance was dismissed at arbitration. Our enquiry does not focus on the merits of the case. It is limited to the conduct of the union and centres on whether or not - in its representation of Eamor regarding his dismissal by Air Canada and the grievance process that ensued - it fulfilled its duty of fair representation pursuant to section 37 of the Code. (See A. da Silva et al. (1991), 85 di 64 (CLRB no. 869); Claudio Ricci (1991), 84 di 215 (CLRB no. 863); Anthony William Amor (1987), 70 di 98; and 18 CLRBR (NS) 249 (CLRB no. 633); and Karen Ashton (1993), 92 di 55 (CLRB no. 1017).)

Section 37 of the Code provides:

*"A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

The general principles with respect to the duty of fair representation were canvassed in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509. The Supreme Court of Canada stated the following:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

- 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
- 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
- 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
- 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
- 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527; emphasis added)

In circumstances which involve dismissal or a matter which could have severe adverse consequences on an employee's job, a higher degree of diligence is required of the trade union. In such circumstances, the Board more carefully scrutinizes the union's representational conduct, and will apply its standards more stringently, to ensure that the duty of fair representation is met.

*"Where the grievance involves a dismissal, the union's obligation to represent the employee will be of a much higher standard. In such cases, the decision not to process the grievance must be based on a careful and informed study of, and conscientious attention to, the substance of the case; ..."*

(Malcom Horton (1993), 92 di 40 (CLRB no. 1015); page 44)

(See also David Coull (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957); Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); André Gagnon (1986), 63 di 194 (CLRB no. 547); Jerry Sabo (1994), 94 di 24 (CLRB no. 1060), at page 27; and Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443), at pages 124-125.)

In the present case, the union's conduct must be reviewed in light of its obligation to act in a manner that is neither arbitrary or in bad faith. The question of discrimination does not arise.

A union is constrained, in its representation of an employee, from acting in an arbitrary manner. Arbitrary conduct is described as making no, or only a perfunctory or cursory, inquiry into an employee's grievance or demonstrating a non-caring attitude towards the employee's interests. It encompasses gross negligence and includes a reckless disregard for the interests of the employee. As stated by the Board in Cathy Miller (1991), 84 di 122 (CLRB no. 854):

*"In viewing failures by unions in their representation of employees, the CLRB, other labour relations boards and the courts have distinguished between negligence that is merely 'simple' and negligence that is 'serious'. In the **Brenda Haley** case (see **Brenda Haley** (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271); and **Brenda Haley** (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304)), the full Board in plenary session made a policy decision that 'simple negligence' was not a breach of the duty of fair representation but*

*that seriously negligent conduct would equate to arbitrariness and be in violation of section 37. Similarly the Supreme Court of Canada in **Canadian Merchant Service Guild v. Guy Gagnon et al.**, [1984] 1 S.C.R. 509; and (1984), 84 CLC 14,043 said in effect that union representation must be 'without serious or major negligence' (pages 527; and 12,188) and in **Centre hospitalier Régina Ltée v. Labour Court**, [1990] 1 S.C.R. 1330, repeated that a union must represent the employee without 'serious negligence' (page 1349).*

...

*It appears that the Ontario Board's test to determine if there has been gross negligence in a particular case is whether the attitude of the union has been non-caring or perfunctory. In Jeffrey Sack and C. Michael Mitchell, **Ontario Labour Relations Board Law and Practice** (Toronto: Butterworths, 1985), there is the following summary:*

*'Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to obtain the data to justify a decision; it has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent and summary, or capricious and non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. As the Board said in **ITE Industries**:*

*'It is clear that in order to establish a breach of section [68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a 'flagrant error' consistent with a 'non caring attitude', or have acted in a manner that is 'implausible' or 'so reckless as to be unworthy of protection'. In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.'*

*The Board has said, however, that there comes a point when mere negligence becomes gross negligence which may be viewed as arbitrary when it reflects a complete disregard for critical consequences. ...'*

..."

(pages 130-131)

(See also Brenda Haley, *supra*, at pages 324-325; Rayonier Canada (B.C.) Ltd., [1975] 2 CLRBR 196 (B.C.) at pages 201-202; Allan Kelland, BCIRC No. C248/92; Charles Morgan, [1980] 1 CLRBR 441 (B.C.); and Kenneth Edward Homer, [1993] OLRB Rep, May 433 at pages 434-435).

A union may breach section 37 by arbitrarily accepting the employer's allegations about an employee's conduct without investigating the matter on its own; see Robert Emard (1991), 85 di 190; and 16 CLRBR (2d) 59 (CLRB no. 883). Similarly, a total lack of representation constitutes arbitrary conduct: see Malcom Horton, *supra*; Tom Forestell and Randall Hall (1980), 41 di 177; and [1980] 3 Can LRBR 491 (CLRB no. 265); Jean-Pierre Plante (1992), 90 di 163; and 93 CLLC 16,041 (CLRB no. 982); and Luc Gagnon (1992), 88 di 52 (CLRB no. 939), affirmed by Cartage and Miscellaneous Employees Union, Local 932 v. Canada Labour Relations Board et al., judgement rendered from the bench, no. A-824-92, June 14, 1994 (F.C.A.); and Jerry Sabo, *supra*.

Bad faith refers to a subjective state of mind or conduct. It arises in circumstances where a union representative acts fraudulently; or for improper motives; or out of personal hostility or revenge. Bad faith occurs, as well, where the union, in its representative capacity, acts dishonestly or deceitfully. Likewise it is present where the failure to represent is for sinister purposes: see Brenda Haley, *supra* at page 324; and Abdel Elejel [1985] OLRB June Rep 841 at page 852.

The concept of fair representation envisages that such representation by the union will, as the words imply, be fair and genuine; and, that it will be undertaken with integrity and competence; see: Carmen Resel et al. (1994) 95 di 120 (CLRB no. 1086) pages 128-129. It presupposes that the union will act honestly and objectively.

To be in a position to provide a member with the kind of fair representation envisioned in Gagnon, supra, union representatives must, of necessity, avoid situations where their personal interests, or those of the union, conflict with the interests of the employee; see: Fritz Steisslinger, 91 CLLC 16,027, BCIRC No.C68/91; Ed Cherak, BCIRC No. 202/90, reconsideration of IRC No C59/90; and Abdel Elejel, supra. Where the union finds that the interests of an employee are in conflict with those of the union - or of the union representatives themselves - it must, at a minimum, immediately disclose the conflict of interest to the employee. It is difficult to imagine that a union's representation of a member could be seen to be undertaken with integrity and competence or otherwise be honest, objective or genuine, in circumstances where it is aware of a conflict of interest between it and its member - or of the participation of its own officers in the instigation of an investigation of that member - yet it fails or refuses to disclose the same.

## V

Following the withdrawal of Mr. Keenan, its original counsel, Mr. Irwin Nathanson, Q.C. concluded the hearing on behalf of CALPA. He filed a comprehensive brief on CALPA's behalf which addressed a number of arguments, all of which were considered; some of which are addressed below.

The union argued that insofar as the collective agreement allows the grievor to proceed through the grievance steps and to arbitration without CALPA's representation; and, since the union represented Eamor at Steps I and II; and, since

the union was steadfastly prepared to represent Eamor throughout the grievance process, there was in fact no breach of section 37.

We do not agree.

The fact that Eamor was entitled, by the terms of the collective agreement, to personally proceed through the grievance/arbitration process does not, therefore, alleviate the union, in its representational capacity, from its statutory obligations under section 37. That the union is aware of this is apparent from statements contained in its Grievance Checklist (Exhibit 42) which provides:

*"... If the individual is proceeding on their own without CALPA support, the Union still has an obligation to offer assistance during the procedures. The grievor may ask you to plead his case at the hearings. If he/she prefers to make the presentation, your job is to make sure the rights of the member are not compromised by Company officials..."*

At the time that CALPA's chief officers at LEC 7, Kuruluk and Ward, disclosed the matter to Air Canada, the union clearly had a representational obligation to Eamor. As well, it represented Eamor at the date of his dismissal. It represented him at Steps I and II of the grievance process; and, up until the meeting of November 5, 1992, it continued to represent Eamor. Even after it was informed that Eamor no longer wished its representation, and counsel for Eamor specifically requested it to stay away from the arbitration hearing, CALPA attended and, over the objection of Shortt, applied for and received standing to represent CALPA's interests. Although CALPA clearly "represented" Eamor, regrettably, as discussed later, the representation was arbitrary and exhibited bad faith.

The union further argued that the failure of Kuruluk and Ward to inform Eamor of the investigation, which they instigated, was an "error in judgement" and their inaction in this regard was not actuated by malice.

We do not agree.

After hearing the testimony of Ward, and observing his demeanour, we are satisfied that he harboured considerable enmity toward Eamor. He admitted to losing over \$20,000 on stocks that Eamor promoted. Although he contended that his intent was to look after the interests of Bruce Cameron, our faith in that contention waned with his responses regarding the consequences of his actions on Eamor's life. His concern about Eamor's predicament was uncaring at best. He indicated that he knew, when he went to Air Canada, that doing so would "injure Brian Eamor". In response to a question as to why he did not speak to Eamor to advise him that he was in jeopardy, Ward replied that he and Kuruluk "went forward to represent Bruce Cameron's interests". According to him: "it was a specific task and then I got busy with other things. I have a young family and I belong to community organizations. I didn't think about it again."

It is simply not credible that Ward could have just "forgotten" about Eamor. His answer, above, showed a cavalier and non caring attitude at best and, when taken with all the circumstances, betrayed his motives both in bringing the matter to Air Canada in the first place, and his subsequent failure to inform Eamor of the same.

We have similar reservations about the motives of Kuruluk. Considering Kuruluk's knowledge of his obligations as Chairman of the LEC, his explanation for going to Air Canada without alerting Eamor because he decided that:

*"...if they did that, Air Canada would determine the facts and that would protect Cameron; if there was nothing to it - everyone would be fine; if it was true, after investigation, CALPA would then represent Eamor." (supra, pages 4-5)*

simply beggars understanding. One is driven to ask: how is it that Kuruluk was prepared to have Air Canada conduct an investigation to determine if Cameron's

version of the events was correct when he had not even spoken to Cameron prior to going to Air Canada? Bearing in mind the fact that he was the President of LEC 7, and that he was aware of his responsibilities under both the Pilot Advisory Program and the Grievance Checklist, his conduct in failing to inform Eamor is indicative of far more than simple bad judgement. In our view, the "oversight" by Kuruluk, in the circumstances, is indicative of mala fides.

The ulterior motives of Kuruluk and Ward are underscored by their total lack of investigation, consultation, or discussion with anyone prior to going to Air Canada. Kuruluk simply accepted Ward's comments about what Cameron had to say. They never spoke to Eamor. Even though Kuruluk acknowledged that it was his duty to fulfill the requirements of the Pilot Advisory policy in circumstances such as Eamor's, he did not do so. Finally, by withholding the information from Eamor that they had instigated the investigation, and in refusing to offer him the assistance that normally is offered pilots in trouble, they effectively eliminated any opportunity Eamor might have had to avail himself of the Pilot Advisory Program at a time when it could have been of practical assistance to him. Considering the repercussions which they must have known would ensue, their actions provide an explicit manifestation of their bad faith and total disregard for Eamor's welfare, as well the personal animosity which motivated it.

Finally, the union argues that in bringing the matter to Air Canada's attention, Kuruluk and Ward, as representatives for CALPA, were choosing between Cameron's interest and Eamor's, and, in so doing, they legitimately exercised a discretion, where the interests of employees conflict, that resides with the union. He quotes, in that regard, Justice L'Heureux-Dubé in Gendron v. Supply and Services Union of PSAC, Local 50057, [1990] 1 S.C.R. 1298:

*"The principles set out in Gagnon clearly contemplate a balancing process. As is illustrated by the situation here, a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. ... In a situation of conflicting employee*

*interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable."*

(pages 1328-1329)

Although section 37 imposes a statutory duty of representation that is owed to all employees equally, the Board recognizes that unions must often choose between conflicting interests, be they between individual employees or between a specific employee and the union membership in general. However, this discretion is limited in situations of critical job interest. In Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330, the Supreme Court stated:

*"The duty of fair representation raises thorny problems when, as here, by its very function the union has an obligation to defend the interests of members of the bargaining unit as a whole, as well as those of an individual employee. These interests can be and often are indeed divergent.*

...

*As Gagnon pointed out, even when the union is acting as a defender of an employee's rights (which in its estimation are valid), it must take into account the interests of the bargaining unit as a whole in exercising its discretion whether or not to proceed with a grievance. The union has a discretion to weigh these divergent interests and adopt the solution which it feels is fairest. However, this discretion is not unlimited. Simply saying that the union has the right or power to 'sacrifice' any grievance, which it feels is valid at that stage, during negotiations with the employer, in order to obtain a concession of better working conditions or other benefits for the bargaining unit as a whole, would be contrary to the union's duty of diligent representation of the employee in question. ...*

...

*The exercise of this discretion by the union will also depend on the nature of the rights which the employee is seeking to enforce by his grievance. There will be situations where the abandonment of an apparently valid grievance by the union will have such consequences for the employee in question that it will substantially restrain the union's discretion. When, for example, the purpose of the grievance is to challenge a dismissal, the employee will not accept any half measures: only reinstatement will be a suitable remedy. Some have suggested that in such a case the union has no discretion and the employee's right to have his grievance arbitrated is absolute.*

...

*Accordingly, without necessarily accepting this statement in absolute terms, a union must recognize the importance of an employee's individual interest when exercising its discretion whether or not to proceed with a grievance against a dismissal or disciplinary sanctions..."*

(pages 1347, 1349, 1351, and 1352; emphasis added)

The same principle holds true for those circumstances where a union considers it critical to bring the conduct of a particular employee to the employer's attention. In so doing, the union must not act in a manner that offends the principles of fair representations set out in Gagnon, supra. In Toronto East General and Orthopaedic Hospital Inc., [1980] OLRB Rep Apr. 555, the OLRB stated the following to that effect:

*"There may well be situations in which a union official is justified in requesting that management remove an employee from the workplace. One example that comes to mind is that of an employee who consistently engages in unsafe conduct which poses a direct threat to the wellbeing of other bargaining unit employees. Even where a union official is concerned with the continued presence of an employee in the workplace, however, he must bear in mind that he still owes a duty of fair representation to that particular employee. The union official owes it to the employee to address himself to the merits of any allegations raised against the employee and not demand his removal simply on the basis of rumour or unfounded suspicions."*

(page 563)

The language of Gendron, supra, and Centre hospitalier Régina Ltée, supra, presupposes that the union, after examining each of the interests at stake in detail, and conducting itself in a fashion that comports with its obligations under section 37 of the Code, will make an informed choice with respect to which interest it will pursue. However, such was not the case here. CALPA did not carry out even the most rudimentary duties required of union representatives which would provide them with the information and ability to make an informed choice between the respective interests of Cameron and Eamor.

Even if it had done so, choosing the interests of Cameron did not alleviate the union from subsequently carrying out its responsibilities on behalf of Eamor. The reference in Gendron, supra, that the union may pursue one set of interests "...to the detriment of another..." cannot be taken in the sense that the union can act in a purposely injurious or detrimental fashion toward the member whose interest it chooses not to advance. The reference has particular meaning in circumstances such as, *inter alia*, where the union is required to choose between competing seniority claims, bumping rights or conflicting interests of an individual employee and the bargaining unit as a whole in the interpretation of the collective bargaining agreement. With rare exceptions, the union maintains the exclusive right to file grievances and represent its members with respect to issues arising under the collective bargaining agreement. In those cases, a decision by the union to pursue one competing interest to the exclusion of the other, necessarily results in one side being unable to pursue its perceived interest. Therefore, the union, in selecting one of two competing interests to pursue, by definition, does so to the practical "detriment" of the one not chosen.

However, the phrase cannot be taken to have an adversarial connotation, especially in dismissal or disciplinary situations. In Steele v. Louisville & Nashville Railroad Co. (1944), 323 U.S. 192 (U.S. Supreme Court), [15 LRR Man.708], Chief Justice Stone made the following observation in that regard:

*"The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed."*

(page 202; emphasis added)

The choice of one position over another, all other considerations being met, is not objectionable. What is objectionable, in the circumstances of the present case, is the motivation and method used to make the choice between Cameron and Eamor. The motivation was bad faith; the method was arbitrary.

## VI

The arbitrary nature of the union's representation at the outset, and the bad faith that it revealed, continued through the grievance process.

When Eamor was taken off line on March 27, 1992, he was met and represented, not by Kuruluk as the Grievance Checklist requires, but rather by Curran who, by his own admission, had never represented anyone before. CALPA did not investigate the occurrence. It preferred instead to accept the facts as disclosed by the employer's investigation. It made no attempt at the dismissal meeting to advance Eamor's interest. It is not insignificant that immediately after Eamor's dismissal, and prior to any investigation or discussion, Dean, on behalf of CALPA, suggested that he resign.

This arbitrary and perfunctory conduct manifested itself through Steps I and II of the grievance process both in CALPA's lack of preparation for, and representation at, the

proceedings, and, by its purposive obfuscation and withholding of information from Eamor. At the grievance hearings CALPA was, at best, passive. In addition, it inexplicably refused to assist Eamor to attend at Steps I and II or to require Air Canada to hold the grievance hearings at the Winnipeg base. Consequently, Eamor was forced to personally absorb those costs.

Although Captains Curran, Cockburn or Dean did not testify, it was nevertheless apparent - as reflected by Curran's presence when Eamor was taken off line - that CALPA's representatives were aware of CALPA's involvement and its obvious conflict of interest by the time of Eamor's dismissal.

There was a clear obligation on the union, in the circumstances, to disclose to Eamor, as soon as possible, that its representatives were involved in the initiation of the investigation leading to his dismissal. What is evident however, is that the conflict was repeatedly denied by CALPA. According to Finlayson, as late as the meeting of November 5, 1992, CALPA's representatives refused to admit to its participation. Accordingly, the initial conflict of interest was compounded by CALPA's refusal to disclose or even acknowledge its participation - particularly to Finlayson who initially relied on CALPA for assistance. As the grievance process wore on, CALPA made no attempt to extricate itself from its conflict position. On the contrary, it insisted on providing representation to the complainant through the grievance process and at the arbitration hearing.

By the November 5, 1992, meeting, CALPA was aware of the full circumstances surrounding the case, including the initial choices made by its chief officers at LEC 7, and the personal conflicts and hostility that existed in certain factions of the union Executive with respect to Eamor. By that date, Eamor had retained Shortt, instructed him with respect to Step III of the grievance procedure, and requested that CALPA pay his legal costs. CALPA, however, took the intractable position at that meeting that although it was prepared to represent Eamor, it would not pay for any other counsel to do so.

As evidenced by its subsequent insistence on securing standing at the arbitration hearing, CALPA, ipso facto, recognized a real conflict between the position to be taken by Eamor at the arbitration and the consequent threat, as perceived by CALPA, to the "integrity, application and interpretation of the collective agreement" which that would entail. Were that not the case, there would have been no need for CALPA to insist on participating at the arbitration. That conflict was immediately recognized by the Arbitrator who concluded that: "...there was an evident and apparently irreconcilable conflict between the Grievor and the Association." (infra; page 42). The obvious conflict was "evident" and must have been apparent to CALPA at the time of the meeting on November 5, 1992. At that point CALPA was obligated, at a minimum, to remove itself from the grievance process entirely and ensure that Eamor received fair and independent representation. The refusal of CALPA to do so at that meeting, when taken with its obdurate insistence that it continue to represent Eamor was, in all the circumstances, arbitrary and a clear manifestation of the union's bad faith.

## VII

We turn now to the events leading up to and surrounding the arbitration hearing.

Counsel for CALPA, citing Gordon D'Eri (1992), 89 di 211 (CLRB no. 969); and Rogers Cable T.V. Ltd. (Hamilton) (1992), 88 di 84; and 92 CLLC 16,053 (CLRB no. 942), argued that:

*"... the complaint in this case can only be founded upon, and relief can only be granted with respect to, events arising on or after October 14, 1992 -- 90 days prior to January 12, 1993." ...*

(Counsel's brief, paragraph 135)

In our view, the decisions cited do not stand for the proposition that the Board is restricted to consider only those events arising within the 90-day time-limit. On the contrary, if the complaint is timely, the Board may take into account the entire course of the union's continuing representational conduct, provided that the evidence adduced is relevant:

*"... The employer's explanation and rationale for having fired the employee for grounds other than those forbidden by section 94 of the Code may relate to incidents that occurred before the actual day of dismissal and thus more than 90 days before the complaint was filed. Similarly, the union's endeavour to paint a picture of employer anti-union animus may be based on evidence of incidents that also occurred somewhat more than 90 days before the complaint was filed. To suggest that the Board should not hear evidence in a case like that from either party, if it had to do with happenings more than 90 days before the complaint was filed, evidence that might tend to provide proof favouring the position of one or other of the parties, is ridiculous, to put it mildly. While section 97(2) specifies that certain complaints can only be 90 days "old" at the most, nothing in the Code regulates the age of the evidence adduced to support or contradict a complaint. The rule concerning evidence must be relevance, not age."*

(Rogers Cable T.V. Ltd. (Hamilton), supra, pages 88-89; and 14,418)

Further, as indicated in Centre hospitalier Régina Ltée, supra:

*"...In this connection I should say at the outset that a union's duty of fair representation does not cease in relation to a grievance proceeding once the grievance has gone to arbitration. It may continue even after the arbitrator's final decision (for example, in Asselin v. Travailleurs amalgamés du vêtement et du textile, local 1838, [1985] T.T. 74, at p.93, where the Labour Court concluded the union had a duty to evoke the arbitrator's erroneous decision), subject to Gendron v. Municipalité de la Baie-James, supra, which held that in such a case the s.47.5 L.C. procedure could not be applied. As Gagnon, LeBel and Verge point out, this duty of fair representation, as a corollary of the exclusive right of*

*representation, must inform all the union's action throughout (Robert P. Gagnon, Louis LeBel and Pierre Verge, Droit du travail (1987), at p.311):*

*[TRANSLATION] The duty of representation will end with the loss of certification. Until that happens, the union will be held to it at all stages of the collective representation, both in negotiating the content of the collective agreement and in its implementation as it affects one or other of the employees."*

(pages 1347-1348)

The union's obligation, pursuant to section 37, to represent its members in grievance matters, does not cease when the arbitration process commences; (Centre hospitalier Régina Ltée, supra, and Tony Pepe, October 4, 1993 (CLRB LD 1212)). It begins at the time the union becomes aware of circumstances which require it to perform in a representational capacity and continues until the final conclusion of the matter. In the appropriate circumstances, it may include the conduct of the union at the arbitration and/or the obligation to proceed to judicial review of the arbitration decision. Section 37 imposes an obligation on the union to make a determination regarding a judicial review application based on the same standards developed with respect to its decision not to proceed to arbitration.

Although evidence regarding the union's conduct at the arbitration hearing cannot provide a timely jurisdictional basis with respect to the present application before us, the Board is nevertheless entitled to examine the union's entire representational conduct, including its conduct at the arbitration hearing. The union's conduct before the arbitrator, in the present case, is relevant only as part of the total picture, and in particular for the purpose of further demonstrating the union's bad faith and arbitrary conduct which preceded it.

With those general comments we turn to the facts surrounding the arbitration hearing.

As indicated earlier, as at November 5, 1992, CALPA's counsel was effectively removed as Eamor's legal representative. Consequent thereon, Shortt requested that CALPA stay away from the arbitration, and offered to protect CALPA's interest, if any, that might arise at the hearing. It was Shortt's opinion, with which we concur, that if CALPA appeared at the hearing it would give the clear impression that CALPA did not share Eamor's conviction that the dismissal should be reduced to a suspension.

When he requested that its representatives not attend the arbitration hearing, Shortt offered to ensure that CALPA's interest in the "integrity, application and interpretation of the collective agreement" would nevertheless be preserved. To the knowledge of CALPA, Shortt had many years experience and expertise as a labour lawyer, along with a sterling reputation in that field. Although CALPA may well have had an interest in the integrity of the collective agreement, that interest could have been preserved in a fashion which did not entail CALPA essentially acting against the interests of its member. With even a minimum of goodwill, CALPA could have ensured that its professed interests at the arbitration were protected by Shortt, without compromising the interests of Eamor.

Undaunted by Shortt's exhortation, CALPA specifically applied for standing at the arbitration hearing to permit it to attend, cross-examine witnesses, and present argument, for the purposes of addressing the "integrity, application and interpretation of the collective agreement". The application was opposed by Shortt, but nevertheless allowed by the Arbitrator. The circumstances of CALPA's attendance at the grievance arbitration are best expressed in the words of the arbitrator who, in his decision at page 2, states as follows:

*"Under the terms of the Collective Agreement the Grievor exercised his right to proceed to arbitration with Counsel of his choice. For his own reasons, the Grievor chose not to be represented in this arbitration by the Association. He appeared through his Counsel at an application brought by the Grievor a couple of weeks prior to the hearing, for production of documents. When the hearing commenced on May 17th, 1993, the Association applied for full*

*standing as a party to these proceedings, with the right to examine and cross-examine witnesses and to make argument and submissions. The application was opposed by the Grievor. It was obvious that there was an evident and apparently irreconcilable conflict between the Grievor and the Association. Counsel for the Association insisted that it had offered to represent the Grievor and continued to offer to represent him at these proceedings. Counsel for the Grievor submitted that by exercising his Collective Agreement rights to engage his own Counsel, the Grievor had, at the same time, effectively elected to have his Counsel represent the Association.*

*After hearing argument from Counsel for the Grievor and Counsel for the Association and considering the authorities submitted by Counsel for the Grievor, I decided that the provisions of the Collective Agreement giving the Grievor the right to be individually represented did not, in the circumstances here, oust the right of the Association to be a party to these proceedings. I was satisfied that the Association had a legitimate interest in the integrity, application and interpretation of the Collective Agreement it negotiated with the Employer. ..."*

(emphasis added)

The impression that CALPA was not "on side" with Eamor had to have been made crystal clear to the Arbitrator when CALPA cross-examined 9 of the 14 witnesses called on Eamor's behalf, including Eamor's wife. We are left to wonder what possible assistance CALPA might have gleaned in its quest to interpret the collective agreement by cross-examining Mrs. Eamor?

CALPA's conduct in attending the hearing, cross-examining Eamor's witnesses, and presenting separate argument from the grievor, in an atmosphere where it was, in the words of the Arbitrator: "...obvious that there was an evident and apparently irreconcilable conflict between the Grievor and the Association" was, according to the seasoned labour relations perspective offered in Shortt's uncontradicted testimony, prejudicial to the interests of Eamor.

But for the efforts of CALPA, this "irreconcilable conflict" astutely perceived by the arbitrator, although true, would not have become apparent, nor would it have left the impression, as it surely must have, that the union and the grievor were in conflict over the position taken by the grievor at the hearing. In our view, by its conduct CALPA confused its obligation, as referred to in Steele v. Louisville & Nashville Railroad Co. supra, to "...act for and not against those whom it represents...".

The issue of whether the adversarial nature of CALPA's presence at the arbitration had a prejudicial effect on Eamor's case, is a matter to be decided in another forum. However, we conclude that when taken with its conduct from the outset, CALPA's presence at the arbitration, whether it actually had that effect, was nevertheless intended to be prejudicial to Eamor.

It is of no consequence that CALPA professed, at the arbitration hearing, that its purpose in insisting on participating was not only to preserve the integrity of the collective agreement but also to assist Captain Eamor. Considering the circumstances, and its conduct preceding the arbitration hearing, the gift of "assistance" which CALPA insisted on proffering was nothing more than a trojan horse.

## VIII

Counsel for CALPA argued that Eamor's complaint is in any event untimely pursuant to the provisions of section 97(2) of the Code. Section 97(2) requires that a complaint alleging a breach of the union's duty of fair representation:

*"shall be made to the Board not later than ninety days after the date on which the complaint knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

The Board may not extend the 90-day time-limit of section 97(2) (see Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902). However, it has the discretion to decide when the complainant knew or ought to have known of the circumstances giving rise to the complaint. Overall, this determination is a question of fact left to the Board (IBEW v. Canada Labour Relations Board (1993), 41 A.C.W.S. (3d) 666 (F.C.A.)).

The complaint herein is timely for two reasons. Firstly, CALPA's initial conduct, through its officers at LEC 7, in contacting Air Canada and refusing to advise Eamor of the same, was motivated by hostility and enmity toward the complainant and manifested bad faith. Its failure to disclose its role in the circumstances not only exacerbated Eamor's problems but reinforced CALPA's continued conflict of interest in its representation of him. The conflict of interest continued throughout the entire grievance process and remained until "purged" by the union's admission of its involvement and its withdrawal as a representative of Eamor. The union's involvement over the course of the grievance process, and its refusal to ensure the fair representation of Eamor by independent counsel, as late as November 5, 1992, in the circumstances, caused it to remain in a continued conflict of interest position and thereby in breach of section 37.

Secondly, although the events surrounding this case can be viewed as a continuum, the union's conduct over the course of the entire process demonstrated a number of discrete breaches of section 37; each of which, in and of themselves, would give rise to a timely complaint as envisioned by section 97(2). One of those discrete instances, was the union's refusal, at the meeting on November 5, 1992, to ensure Eamor's independent representation.

Counsel for CALPA pointed out that Eamor admitted that, as early as September 1, 1992, he determined that he could "no longer trust the union". Finlayson advised him of a similar conclusion by mid October 1992. The union argued that therefore the present complaint should have been filed no later than 90 days from the time when

Eamor received his advice from Finlayson. Although Eamor's continued dependence on the union for assistance may have been naive and ill-advised, it does not deliver the union from its obligations to fairly represent him.

The union was the only entity fully aware of its participation and its own clear conflict. Although it is unnecessary for our purposes here to determine whether the union's relationship with its employees is fiduciary, it is nevertheless clear that, at a minimum, the union cannot represent an employee when by doing so it places itself in a direct conflict of interest with the employee whose job is at risk.

At the meeting of November 5, 1992, CALPA's conflict was clear. Its obligation to disclose the conflict and extricate itself from the representation of Eamor was equally clear.

CALPA's failure to disclose its conflict and ensure that Eamor received fair representation at the Step III process and the arbitration did not depend on any conclusions reached by Eamor in October. The obligation to extricate itself from the conflict of interest and provide Eamor with fair representation, remained with the union. This is doubly so in the circumstances here where Shortt, obviously aware of the ramifications of having CALPA inside rather than outside of the tent, did his best to reach an agreement with CALPA prior to filing the section 37 complaint (Ex. 19-73). Even if Eamor's earlier determination that the union could not be trusted were germane, the time limit on the same would not begin to run until it became clear to him that the union had placed itself in a conflict of interest position with respect to his grievance that rendered impossible CALPA's fair and un-biased representation of him. The crucial action of the union which gave rise to the above determination by Eamor, was CALPA's decision not to extricate itself from the conflict of interest situation it placed itself in and provide independent representation for Eamor. That did not take place until November 5, 1992.

For the purposes of the present application, CALPA's final discrete act in the continuum of events which constituted an individual breach of section 37, occurred on November 5, 1992. Accordingly, as of November 5, 1992, the complainant had ninety days to file his complaint with the Board. That was done. The complaint is therefore timely.

For the reasons set forth above, the complaint, being timely, is allowed.

## IX

We turn now to the issue of remedy.

The Board is not empowered to order that a new arbitration hearing be held. Any remedy which we can provide to Eamor, at this stage, is restricted to those permitted via section 99 of the Code. Nevertheless, through the same, the Board has available to it a broad array of remedies designed to "make whole" a successful complainant in circumstances such as the present. As indicated in Cathy Miller, supra:

*"On the other hand, while the Board has almost always confined itself to prescribing a procedural, rather than a substantive, remedy for violations of section 37, the language of section 99 of the Code is broad enough, in our opinion, to permit the ordering of something more substantive than has been the norm where such might be deemed appropriate. Section 99(1)(b) reads as follows:*

*'99. (1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may*

...

*(b) in respect of a contravention of section 37, require a trade union to take and carry on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on the employee's behalf or ought to have assisted the employee to take and carry on; ...'*

However, section 99(2) reads as follows:

*'99. (2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.'*

*We take this to offer the Board in the case of a dismissal, for example, the option of deciding that a union's violation of section 37 shall not be directed to arbitration, with any consequent impact on the employer, but shall fall wholly upon the union in terms of some substantial payment of money to compensate for the loss suffered by a person by the fact that his or her grievance was mishandled contrary to the Code and the person has no job. Of course, such a remedy would be unconventional in relation to what has been the practice of the Board, but it is nevertheless possible to speculate that it might well be a valid approach in the appropriate set of circumstances.*

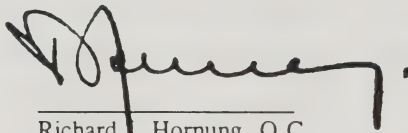
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(pages 128-129)

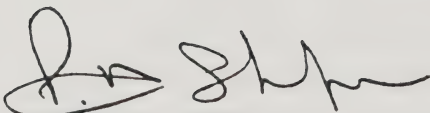
Eamor is entitled to the full payment, by CALPA, of all his reasonable legal fees and expenses related to the hearing before this Board. Furthermore, Eamor is entitled to the full payment of all reasonable legal fees and expenses related to the prosecution of his grievance and the arbitration hearing; this shall include his expenses and costs of attending all the grievance hearings. We hereby order the payment of the above by CALPA.

We believe it is in the best labour relations interests of all the parties if we withhold our determination with respect to the remaining issue of damages - as well as any legal fees and expenses which relate to Eamor's judicial review application before the British Columbia Supreme Court - until after the decision of the British Columbia Supreme Court in the judicial review application, and the parties have been given an opportunity to address the Board with respect to the same.

With that goal in mind the Board, pursuant to section 20 of the Code, will retain jurisdiction with respect to the implementation of its order as above, and to the ordering of a further remedy herein. We direct that the hearing of this matter be reconvened, if necessary, following the decision of the British Columbia Supreme Court in Eamor's judicial review application, or if no decision is forthcoming upon the application of any party, in order to provide the parties with an opportunity to address the issue of damages, if any, payable to Eamor as well as any further costs and expenses.



Richard J. Hornung, Q.C.  
Vice-Chairman



Patrick H. Shafer  
Member



Robert Cadieux  
Member

# Information

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## Summary

Donna Beaven et al., *complainants*, and Telecommunications Workers Union, *respondent*.

Board File: 745-5013  
CLRB/CCRT Decision no. 1163  
May 16, 1996



## Résumé

Donna Beaven et autres, *plaignantes*, et Syndicat des travailleurs en télécommunications, *intimé*.

Dossier du Conseil: 745-5013  
CLRB/CCRT Décision n° 1163  
le 16 mai 1996

This is a complaint filed pursuant to sections 95(f) and (g) of the Canada Labour Code. The complainants allege they were discriminated against when their union imposed on them disciplinary sanctions and suspensions from membership. The sanctions were imposed following the complainants' non-respect of a secondary picket line. During that time, it is unclear what were the union rules concerning picketing. Many employees respected the line while others openly crossed it or found alternative means of working. Only those who openly crossed the line were charged.

The union's right to discipline a member for not respecting a picket line is well recognized in Canada, and the fact that the picket line in question was a secondary picket, and the secondary picket of a competitor, is of no consequence in the present case. The union's interest as a member of the labour movement requires the power to ensure that any legal picket line is respected.

Il s'agit en l'espèce d'une plainte déposée en vertu des alinéas 95f) et g) du Code canadien du travail dans laquelle les plaignantes allèguent qu'elles ont fait l'objet de discrimination lorsque leur syndicat leur a imposé des mesures disciplinaires et les a suspendues. Ces mesures ont été imposées par suite de leur non-respect d'une ligne de piquetage secondaire. Pendant cette période, les directives du syndicat concernant le piquetage n'étaient pas claires. De nombreux membres ont respecté la ligne, mais d'autres l'ont franchie ou ont trouvé d'autres moyens de travailler. Seuls les membres qui ont franchi la ligne de piquetage ont fait l'objet d'accusations.

Le droit d'un syndicat d'imposer des mesures disciplinaires à un membre pour non-respect d'une ligne de piquetage est reconnu au Canada, et le fait qu'il s'agissait d'une ligne de piquetage dressée par un concurrent n'a pas d'importance dans la présente affaire. En tant que membre du mouvement ouvrier, le syndicat doit pouvoir s'assurer qu'une ligne de piquetage est respectée.

A union's actions will be considered discriminatory where membership rules are applied to single out individuals on illegal, arbitrary or unreasonable grounds. Such a distinction is arbitrary where it is not based on any general rule, policy or rationale, or if this rule or policy is not clear and known to those who are expected to follow it. Where the rule is unclear and there is legitimate doubt as to its scope of application, discipline based upon it is found to be discriminatory.

The Board concludes that given the ad hoc and seemingly arbitrary selection of those to be disciplined and given the state of confusion that prevailed during the three days of picketing, for the union to impose disciplinary measures on the complainants constitutes a violation of sections 95(f) and (g).

The Board ordered the union to rescind the fines imposed on the complainants and to reinstate their union membership.

Les mesures prises par un syndicat seront considérées comme discriminatoires lorsque les règles d'adhésion sont appliquées de façon à faire une distinction entre individus en se fondant sur des motifs illégitimes, arbitraires ou déraisonnables. Une telle distinction est arbitraire si elle n'est pas fondée sur une règle ou une politique ou si cette règle ou politique n'est pas claire et n'est pas connue de tous ceux qui sont tenus de la respecter. Si la règle n'est pas claire et s'il existe un doute légitime quant à sa portée, les mesures disciplinaires fondées sur cette règle sont discriminatoires.

Le Conseil juge que, étant donné la façon particulière et apparemment arbitraire selon laquelle les personnes qui feraient l'objet de mesures disciplinaires ont été choisies ainsi que la confusion qui régnait pendant les trois jours de piquetage, le fait pour le syndicat d'imposer des mesures disciplinaires aux plaignantes constitue une violation des alinéas 95f) et g).

Le Conseil ordonne au syndicat d'annuler les amendes imposées aux plaignantes et de les réintégrer dans ses rangs.

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## Reasons for decision

Donna Beaven, Eileen Boizard, Michele Canham, Cheryl Clandening, Susan Crayston, Judith Ernst, Brenda Groves, Ingrid Ip, Ann Jeffery, Suzanne Pickstone, Lynne René, and Veronica Sigurdson,

*complainants,*

*and*

Telecommunications Workers Union,

*respondent.*

Board File: 745-5013  
CLRB/CCRT Decision no. 1163  
May 16, 1996

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The Board was composed of J. L. Guilbeault, Q.C./c.r., Vice-Chair, and M. Eayrs and M. Rozenberg, Members. A hearing was held on October 17, 1995, at Victoria, B.C.

### Appearances

Ms. Ingrid Ip, assisted by Ms. Cheryl Clandening, for the complainants;  
and

Mr. Morley D. Shortt, Q.C., assisted by Mr. Peter Massy, Union Business Agent,  
for the respondent.

These reasons for decision were written by Jean L. Guilbeault, Q.C./c.r., Vice-Chair.

## **I. NATURE OF THE APPLICATION**

This is an application filed pursuant to sections 95(f) and (g) of the Canada Labour Code. The complainants allege that they were discriminated against when their Union imposed disciplinary sanctions and suspensions from membership. They ask the Board to rescind the sanctions imposed and to reinstate them as members of the Union.

## **II. FACTS**

The complainants are all employees of B.C. Telephone. They work at its facilities located at 826 Yates Street, Victoria, B.C. All are and continue to be members of the TWU, though at the present time they are suspended. At some point before November 2, 1993, it seems that the IBEW notified the TWU that it would picket 826 Yates Street in the context of its action against Rogers Cablesystems. Even though none of its employees works there, certain equipment belonging to Rogers Cablesystems is allegedly housed in the basement of the building. The IBEW picketed the building November 2, 3 and 4, 1993. The picket line was lifted by an order of the Supreme Court of British Columbia dated November 4, 1993.

Although the numbers are unclear, many employees working at 826 Yates respected the picket line. An undetermined number, however, apparently managed to get themselves redeployed and paid for those days. Nineteen employees of BC Tel entered the building and worked behind the picket line. They gained access to the building through a back door which had been propped open with the apparent complicity of a member of the respondent Union executive. No picket line was protecting this back door.

It is clear from the charge signed by a substantial number of members that all employees who worked during the strike were to be charged under the Union's constitution. The formal charge, reads in part as follows (see exhibit 1):

*"This letter is a grievance regarding union brothers and sisters who worked Nov. 2,3, & 4th while others at 826 Yates st. honoured their picket lines.*

*As per instructions, Tuesday, Nov. 2nd at approximately 9:45am at the Union Centre, our TWU executive declared this was a legal strike. Roger's had filed with Industrial Relations, plus gave 24 hr. notice, we were to honour this until further notice.*

*Some workers deployed themselves to other sites; some drove around as passenger's in company vehicles; some openly crossed the pickets; some crossed after picket members had left during these 3 days.*

*Which of these three actions is the worst? One almost gains a little respect for members who crossed in the open to be viewed.*

*It doesn't matter how these individuals worked for those 3 days to get paid.* *There is no "I" in TWU and the TWU had declared we honour the picket lines till further notice.*

*Strong full disciplinary action is needed regarding the actions of these individuals with no regard to their union membership obligations."*

(emphasis added)

Article XVIII of the Union Constitution deals with internal disciplinary procedure. It provides as follows:

"

**ARTICLE XVIII**  
**Offences, Charges, Trials, Penalties and Appeals**

**Section A: OFFENCES**

*Any member may be disciplined for violation of any of the provisions of this Constitution or Local by-laws or for violation of the policies of the Union or for cause detrimental to the welfare of the Union or for crossing or working behind any picket line without authorization from the executive council.*

**Section B: PROCEDURE ON TRIALS**

1. *Democratic principles of Industrial Unionism to which the Union subscribes require that every member, body or Officer shall be entitled to be notified in writing of charges preferred against him, an opportunity to be heard in his defense and a fair trial given. Only after such procedure has been followed can any penalty be imposed.*
2. *Members charged under the provisions set forth in Section A shall be tried in accordance with the following procedures:*

- (a) *A trial shall be initiated by the filing of a charge signed by no fewer than two members of the Union in good standing. Such charges shall be filed with the Secretary of the Local of which the accused is a member.*

*[...]*

- (c) *The charge shall state the act or acts alleged to have contravened section A of this article.*

*[...]*

- (e) Each local shall have a standing Trial Board Panel consisting of nine members appointed by the President of the Local with the advice and consent of the Local Executive and subject to approval by the Local membership. The Trial Board Panel shall have the same term as Local Officers.

*Appointments to fill vacancies on the Panel shall be made by the Local President with the advice and consent of the Local Executive. In the event a matter is referred to a Trial Board, the Local Secretary shall immediately furnish the accused and the accusers with names of the members of the Trial Board Panel and instruct them to designate a Trial Board of 5 each by striking there from two names.*

*[...]*

- (i) *Where either the accused member or those filing the charges believe that a fair trial is impossible in the accused member's Local because of partiality, hostility, or fear of reprisals, that person may apply to the President of the Union for an order that the trial take place before a Trial Board to be selected from a Trial Panel of members of one or more nearby Locals. The expense for such trial shall be borne by the accused member's local."*

(emphasis added)

Following a Union meeting held on November 15, 1993 (see copy of the minutes at exhibit 8), only those individuals who openly crossed the picket lines were sent letters dated November 25, 1993, notifying them of the charges against them. The relevant portions of the minutes read as follows:

*"Peter Massey*

*Redeployment*

*Several Members were redeployed during the IBEW picketing.*

*Some members were asked if they wanted VT or ATO while others were flatly refused. Peter would like someone to file a grievance. Some members were sent on 'field trips' or redeployed. several of our members seem to feel this is sexist. One possible retaliation may be to write to the newspaper.*

*[...]*

*IBEW Picket Line and Local 21 members who crossed*

*There was a lengthy heated debate regarding the recent IBEW picket line at 826 Yates and the fact that 19 members of Local 21 crossed the line and worked. Some worked all 3 days others worked one or two. We have received a charge signed by 35 members.*

*[...]*

*Motion that we go to a Trial Board M/S/C [motion, second, carried]*

*Recommendations for the Trial board*

*that the fine be \$1000.00*

that the trial board members have attended at least one meeting of  
Local 21  
publish name in the Transmitter  
take away members' good standing"

(emphasis added)

Fourteen of those individuals filed written defence (exhibit 4). All 19 individuals were subsequently found guilty by a Union trial board panel and assessed fines by letter dated December 17, 1993 in the following terms (exhibit 5):

*"The Trial Board of TWU Local 21 has rules unanimously and found you guilty as charged of crossing a legal picket line...*

*Your rate of pay is \$138.52. Seventy percent of that figure is \$96.96. You crossed the picket line on Nov 2, 3, & 4, 1993 so therefore the fine levied against you is \$290.88...*

*A suspension of membership of TWU Local 21 will also be imposed. The suspension will be lifted once the fine has been paid in full within the allotted time frame."*

Of the 19, 4 were Rand members and outside the Union's disciplinary jurisdiction, 3 paid their fines or donated the money to charity. The remaining 12 are the complainants.

The 12 appealed their fines to the convention trial board. This trial board dropped the fines corresponding to November 2, 1993, the first day of picketing, in a letter dated May 6, 1994, which reads in part as follows (exhibit 6b):

*"The fact that a side door in the building was propped open by, or at least with the full knowledge of a local Convention Delegate, with the express purpose of allowing in members who could not "in good*

*conscience" honour a competitor's picket line is appalling. There was also no apparent action taken to correct this by explaining to the members that it was a mistake and no attempt made to stop members entering the building or give them information as to why they shouldn't.*

*However, it should have been obvious to every member involved by the second day of picketing, and was in fact by their own admission, that the building was indeed being picketed. At this point there was a certain amount of responsibility on the part of each member to seek out information and direction from the elected local representatives or Executive Council members present at the time.*

*[...]*

*Therefore, it is the judgment of this Trial Board that the decision of the Local Trial Board be varied to allow for the obvious confusion surrounding the first day of picketing and that the penalty be changed to exclude this day (November 02, 1993) from the total number of days in which a fine of 70% of wages was levied. In conclusion, the fine levied against you will now be: \$193.92"*

(emphasis added)

By letter dated June 9, 1994, the complainants appealed to the President of the TWU stating that they wished to appeal the decision of the convention trial board at the next regular convention of the Union. This appeal was denied by the Convention on January 16, 1995, and the complainants were notified of this fact by letter dated January 30, 1995. On February 16, the complainants filed the present joint complaint.

The 12 have never denied that they crossed the picket line on the three days in question. Moreover, the respondent Union admitted that the complainants are employees, exhausted their internal appeals, and filed a timely complaint.

### III. COMPLAINANTS' ALLEGATIONS AND EVIDENCE

In their complaint and various other documents submitted to the Board before and at the hearing, the complainants alleged the following factual grounds:

1. That Article X Section 9(d)i of the TWU Constitution was not respected by the Union:

Article X Section 9(d) of the TWU Constitution states:

*"The duties of the Locals and Local Executive shall be:*

*[...]*

*(d) to keep rank and file members informed of Union activities and policies."*

In normal circumstances, a union organizing a picket line will inform another union in advance.

In this present case, the IBEW advised the TWU before November 2 of its intention to picket BC Tel facilities on that date.

In normal circumstances, the local executive would advise members accordingly. However, there was no organized attempt by the Union to inform its members, and even the then Vice-president of Local 21 (Ingrid Ip - counsel and complainant) was not notified of the situation. Moreover, during the afternoon of November 1, 1993, the Local president, Sherry

Bannister, was asked about the impending picketing and refused to reply to any questions.

2. That a member of the local executive helped to arrange to have the door propped open, thereby contributing to the general confusion as to the obligations of TWU members.

Judy Say, a local councillor, arranged with a manager to prop open a seldom used door so that members could enter the building. She also told several members that they should use the door if they felt they could not respect the picket line.

It is not clear from the file precisely how many persons entered, how many persons respected the picket line nor how many were able to get themselves redeployed or sent on "field trips". The officer responsible suggested that more than 150 individuals work at this particular location.

3. That the IBEW was a rival union and that the picket line was aimed at Rogers Cablesystems, a direct competitor of BC Tel with no Rogers employee working inside that building.

The complainants alleged that it was unreasonable for them to respect such a picket line given their history with the IBEW and the need to protect their jobs rather than to aid a competitor to shut down their employer, BC Tel, by secondary picketing.

They added that this situation contributed to the general confusion that prevailed during those three days as to the obligations of TWU members.

4. That the Union violated article XXXVI(5) of the collective agreement. Article XXXVI(5) provides as follows:

*"5. Picketing. The Union agrees that it will make prompt investigation of any picketing situation involving Company employees. In the case of a legal picket the Union will immediately make every effort to obtain clearance from the affected Union. Illegal picket lines shall be disregarded.*

*The Company agrees that no employee shall be required to cross any picket line until clearance has been obtained from the President of the Union or their appointee."*

The complainants made three different allegations based on this article. First, they claimed that the Union did not make a prompt investigation nor make every effort to obtain clearance from the affected Union.

Second, the complainants alleged that the TWU made no attempt at obtaining clearance from the IBEW.

Third, the complainants submitted that the secondary picketing was clearly illegal and that the picket lines should have been disregarded. In this regard, it is perhaps important to point out that the Court injunction was issued not on the basis that the picketing was "illegal" according to the collective agreement, but on the likelihood that the predominant purpose of the picketing was to harm BC Tel.

5. That the charges against them were improperly laid according to Article XVIII of the TWU constitution.

Article XVIII, set out above, describes in some detail the procedures to be followed. The complainants appear to allege that the charge violates this article because it does not name them.

While the charge, in fact, does not name the individuals who allegedly crossed the picket line, this requirement is not clearly set out in Article XVIII. The complainant's thus rely on the following submissions of the TWU's counsel:

*"Pursuant to Article 17 [now article 18] of the Constitution of the Union, the Union has no power to take action against its members by itself without a charge being filed by a member of the Union naming a person as being charged."*

6. That the trial board, as convened, violated article XVIII of the Union Constitution.

First, the complainants alleged that article XVIII(B)(2)(e) was violated because the Union did not have a standing trial board. Instead, one was appointed ad hoc to deal with their case following the November 15, 1993 meeting where it was resolved "to go to a trial board".

Second, this trial board was not approved by the membership.

Third, a replacement was announced at the original trial with no prior notification to the accused. Complainants indicated that, thereafter, the Union had decided to comply with this article and keep a standing trial board (see "Meeting Notice", exhibit 3(d)).

7. That the trial board was partial and therefore did not respect the principles of natural justice. The complainants stated that, following the November 15 meeting, it was clear to them that they were to be found guilty and fined. They cited the minutes of the meeting and the declaration of one Bob Hope who said during the selection of the trial board "I'm going to string them up by their toes."

Mr. Hope was originally named as a member of the trial board but was struck from the list by the complainants in accordance with article XVIII of the Constitution.

They complained, in addition, that the trial board was composed of two past presidents and three former shop stewards.

8. That the complainants were discriminated against because the TWU did not discipline members in similar circumstances before and after the incident which concerns them.

Apparently, during a province-wide strike which took place in 1983, several TWU members of Local 21 crossed another union's picket line and were not punished.

The complainants submitted that, in light of the above, this Board should apply its decision in Paul Hewitt, July 31, 1975 (CLRB no. LD 9), and lift the imposed fines and reinstate their membership. They argued that the respondent Union breached its duty to educate its members due to an evident lack of communication and a genuine refusal to exercise true leadership.

#### **IV. RESPONDENT'S REPLY**

The respondent Union replied to the complainants' allegations by denying that it had violated any rights of the complainants or had violated the Constitution or the collective agreement. It further denied that any of the provisions of the Constitution or collective agreement were applied in a discriminatory manner.

Specifically, the Union says the following in regards to the various allegations made by the complainants:

1. The fact that the IBEW represents the employees of a competitor of BC Tel does not alter the fact that the TWU members' crossing of the IBEW picket line constitutes a violation of Article XVIII of the Union Constitution.
2. The picket line in question was not unlawful and was not declared unlawful by the Supreme Court of British Columbia. In any case, this judgement was not rendered until the afternoon of November 4, 1993, when the complainants had already crossed the picket line. The complainants' belief in the illegality of the picket, finally, is irrelevant to the matter to be determined by the Board.

3. With respect to the Union meeting held November 15, 1993, the Union submitted that the recommendations by the participants are not relevant because these were merely recommendations and were not actions taken against the complainants. No actions were taken against the complainants as a result of that meeting, except to appoint a trial board. This was lawful and fully within the rules of the Union pursuant to Article XVIII.
4. With respect to the appointment of the trial board, the Union submitted that the trial board was lawfully appointed and that, in any case, the complainants had waived their right to complain of irregularities in the appointments before the trial board because they had not participated fully in the disciplinary process.
5. With respect to the allegation that the complainants were discriminated against because the Union had not taken any action against certain individuals described in the formal charge, the Union submitted that it knew of no other individuals who had crossed the picket line or performed any other act contrary to the Union Constitution.
6. With respect to the allegation that the original charge does not specify the names of the 19 individuals charged, the Union submitted that all 19 individuals were sent copies of the charges against them.
7. With respect to similar incidents which allegedly took place in November 1983 and November 1994, the Union submitted that no members were charged pursuant to Article XVIII of the Constitution. Without such a charge, the Union itself has no power to institute the disciplinary procedures. It cannot, therefore, be held to have discriminated against the complainants.

8. With respect to the allegations of confusion, the Union submitted that the confusion, if any, had ceased as of November 3, 1993. The convention trial board lifted the fines corresponding to the complainants' actions on November 2, 1993; therefore, any allegations of confusion on November 2nd are no longer relevant to the present proceedings.

The Union submitted in addition that its rules regarding picketing were clear and known to all.

In support of its legal arguments the Union cited several decisions of this Board which will be addressed later. It submitted that its actions as outlined above are properly an internal matter. They do not constitute discrimination because the Union did not set the complainants apart from other TWU members on the basis of illegal, arbitrary or unreasonable criteria. The complainants admitted to having crossed the picket line; the rule against doing so is fair, and the disciplinary process was followed to the satisfaction of the complainants who participated and made submissions at every juncture.

## V. INTERPRETATION OF SECTIONS 95(f) & (g)

Sections 95(f) and (g) read, as follows:

*"95. No trade union or person acting on behalf of a trade union shall*

*...*

*(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by*

*applying to the employee in a discriminatory manner the membership rules of the trade union;*

*(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union; ... "*

There is clearly an overlap between these two provisions (see Gerald Abbott (1977), 26 di 543; [1978] 1 Can LRBR 305; and 78 CLLC 16,127 (CLRB no. 114):

*"...We consider section 185(g) to be addressed to all disciplinary acts, including expulsion and suspension. Section 185(f) is addressed to expulsion and suspension that is discriminatory whether it is disciplinary or not. One is addressed to the purpose (i.e. discipline) of an action while the other is addressed to actions (i.e. expulsion, suspension or denial of membership) without regard to their purpose. That the two overlap does not negate the effect of either. It creates greater protection against discriminatory expulsion or suspension, the harshest of acts, by giving recourse whether it was for disciplinary reasons or otherwise."*

(page 563)

In the present case, while section 95(g) seems most directly pertinent, both sections are applicable since failure to pay disciplinary fines resulted in the suspension of membership. In any event, it seems clear that the key issues to be decided by the Board are the definition and application of the words "discriminatory manner". This expression is found in both sections. According to ordinary rules of construction, its legal definition is the same in both cases. And, indeed, the jurisprudence makes no distinctions between the two sections in this regard (see Paul Horsley (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRB no. 861), at page 205).

### A. Standard of Review

The goal of Parliament in enacting these sections was to strike a balance between the institutional interests of unions and the individual rights of their members. The nature of the tension between these two interests was admirably set out in Fred J. Solly (1981), 43 di 29; [1981] 2 Can LRBR 245; and 81 CLLC 16,089 (CLRBR no. 296):

*"The problem faced by the legislators and the Board in assessing the limits of Parliament's control of internal union affairs is difficult. The essential difficulty is to balance the competing interests that flow from the reality that individuals find real security and protection of their rights through association, but the associated organization best ensures its efficiency by limiting the freedom of those who have entered into it."*

(page 45)

Parliament's choice was not to give the Board a right to sit in appeal of a trade union decision or to allow it to control the content of a union constitution. Instead, Parliament gave the Board the power to intervene in the internal affairs of trade unions only when the rules or actions of the union were discriminatory. This is the same standard of review that is applied to a union's referral rules under section 69(2):

*"Under the Code it is not the Board's responsibility to write rules or administer them, although that is a remedial course of action available under sections 189 and 121 of the Code. That is the task of the unions. The Board must ensure the rules are fair and non-discriminatory and administered in a fair and non-discriminatory manner. That does not mean the Board must or can choose or decide which side of a debate over what is a useful or good or desirable rule will prevail. There are many conflicting views over how referral rules should operate in any circumstance. In all rule making processes there are several clashing interests and points of*

*view. The Board is not the rulemaker and does not decide which interest and point of view will prevail. The Board is not a refuge for those whose views do not prevail when the rules are made."* [Emphasis added; David C. Nauss and Peter H. Roberts (1981), 43 di 263 (CLRB no. 313) at 268-69]

This restricted role has consistently and without exception been confirmed by the jurisprudence. It is expressed by Vice-Chair Eberlee in Jim Saunders (1988), 74 di 165 (CLRB no. 701):

*"...The failure of a union to observe fully the terms of its own constitution and rules in the handling of a matter like this is not invariably tantamount to a breach of section 185(f) and (g). The Canada Labour Relations Board has no general mandate to supervise or police union observance of constitutions, by-laws and rules of order. There are other forums where non-observance of such may be challenged. The Board's involvement in the internal affairs of a union is quite specific, restricted and specialized and in respect of section 185(f) and (g) it has to do with membership rules or disciplinary standards being applied in a 'discriminatory' manner."*

(pages 168-169; emphasis added)

## **B. Members' Duty to Respect Picket Lines**

The Board has consistently recognized that the union has vital interests in ensuring that its members respect picket lines; see Tomislav Seselja, October 19, 1994 (LD 1366):

*"The Board accepts the union's explanation, in fact, that Seselja's offence in crossing the picket line is one of the most heinous offences that a union member can commit and therefore deserving of severe punishment from an organizational standpoint. The Board*

*therefore has neither the inclination nor the intention to interfere with the amount of the fine or the suspension imposed by the union. "*

(page 6)

In Fred J. Solly, *supra*, the Board referred to the abundant literature dealing with a union's right to discipline a member for the non-respect of picket line:

*"One action of a member that evokes a harsh and immediate response from a union is working during a lawful union-sponsored strike. The Supreme Court of the United States has confirmed the Union's right to assess reasonable fines for this action (see NLRB v. Allis-Chalmers Manufacturing Co. 388 U.S. 175; 65 LRRM 2449 (1967) and the voluminous comment on this decision). In Canada expulsion is a common response to crossing a picket line:*

*Unions may be particularly harsh on those members who cross the picket lines erected pursuant to lawful strike activity and return to work. A handful of dissident strike breakers could erode and even break an otherwise successful strike. At the same time, however, while the union interest in maintaining solidarity is understandable and entirely defensible, the individual union member may claim that he has legitimate reasons to dissent. He may content that economic hardship makes his continued support of the strike impossible or that the demands being made by the union are unreasonable or inconsistent with his own personal needs.*

*It may be that mutual reliance is implicit in every strike, that is, that many employees would hesitate to forego several weeks or months of pay if they know that their fellow employees were free to cross the picket line and return to work at their pleasure with impunity. A union could argue that it can enforce an employee's agreement to strike on the basis that it has embarked on the strike in reliance of the employee's promise to support it. There is little*

*doubt that if employees were free to return to work during the strike, without fear of being subjected to reasonable discipline for violating the rules and regulations governing their union membership, the union would experience severe difficulty both in maintaining the effectiveness of that particular strike and in mounting similar activity in the future. The power to fine or expel strikebreakers is essential if the union is to continue as an effective bargaining agent. Thus, while the union's interest is best vindicated by disciplining its members for strikebreaking, the public interest is in seeing that such discipline does not exceed what is reasonable in the circumstances."* [H. Goldblatt, "Union Membership and Individual Rights" in *Labour Law: The Employee, Union Member, Trade Union and Employment Standards*, 1975, pp. A-29-30. See also Clyde W. Summers, "Legal Limitations on Union Discipline" (1951), 64 *Harvard L. Rev.* 1049 at pp. 1066-67]

(page 41)

The fact that the picket line in this case here was a secondary picket line, even the secondary picket line of a competitor, is of no consequence. The interest of the union movement in maintaining solidarity across jurisdictions is similarly well recognized (see P. Weiler, Reconcilable Differences (Toronto: The Carswell Company Limited, 1980):

*"The crucial variable determining the impact of peaceful picketing is whether it is addressed to unionized workers. That kind of picket line operates as a signal, telling union members not to cross. Certainly in British Columbia the response is automatic, almost Pavlovian. That response is triggered by a number of factors: the sense of solidarity among members of the general trade-union movement; an appreciation that it is in the self-interest of each to honour the other fellow's picket line because in their own dispute they will want the same reaction from other workers; a concern for*

*the social pressures and ostracism of other workers if they do not conform to the trade union ethic; the likelihood that they will face serious discipline from their own trade union. It might even cost them their jobs, if they defy that ethic and cross a picket line approved by the trade union movement. In the final analysis, the legal treatment of picketing must rest upon a realistic appraisal of its industrial relations role. The picket line is much more than a simple exercise of a worker's freedom of expression. In a heavily unionized community it is an effective trigger to a work stoppage by a group of employees."*

(page 79)

The rationale for discipline is perhaps not as strong in the case of secondary picketing. The Union's immediate survival and the success of its own actions are not, in most cases, directly in issue. The Union's interest as a member of the labour movement requires the power to ensure - just as Article XVIII of the TWU Constitution provides - that any legal picket line be respected. This is an interest that the Board will recognize and for which union discipline may be imposed.

If, however, the failure to honour a secondary picket line is in fact deemed by unions to be less serious, then this should be reflected in the severity of the sanctions imposed. In the case of a seemingly disproportionate sanction, the Board will verify that the sanction is not unreasonable to the point of constituting discrimination.

### **C. Definition of Discrimination and Burden of Proof**

The key question the Board must answer is whether or not the rule or the application of the rule can be said to be discriminatory.

It is clear that pursuant to sections 95(f) & (g), a union must apply its disciplinary standards and procedures in a just and equitable manner. An individual must not be

singled out for special treatment in the decision to charge, the procedure which is followed, or in the penalty administered (see Gerald Abbott, *supra* at page 114; and Paul Hewitt et al., *supra*).

However, treating employees in the same shoddy manner will not avoid the Board's scrutiny. A rule which is in itself discriminatory cannot be saved by universal application (Gérard Cassista et al. (1978), 28 di 955; and [1979] 2 Can LRBR 149 (CLRB no. 161), Roland Arsenault et al. (1982), 50 di 51; [1982] 3 Can LRBR 425; and 82 CLLC 17,018 (CLRB no. 386); Terry Wilson et al. (1986), 66 di 201 (CLRB no. 583)). Moreover, the Board has consistently adopted a wide definition of discrimination. As the Board wrote in Terry Matus (1980), 37 di 73; [1980] 2 Can LRBR 21; and 80 CLLC 16,022 (CLRB no. 211):

*"As to a definition of these last two words, this Board endorses the criteria set down by Mr. Innis Christie, then Chairman of the Nova Scotia Labour Relations Board, when he said in Daniel Joseph McCarthy and International Brotherhood of Electrical Workers, [1978] 2 Can LRBR 105 at p. 108:*

*In our opinion the word "discriminatory" in this context means the application of membership rules to distinguish between the individuals on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S., 1969, c.11 as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy is one that bears no fair and rational relationship with the decision being made."*

Where a complainant adduces evidence which demonstrates that such an unlawful distinction has been made, the Board will ask the union to explain its actions; see Ronald Wheadon (1983), 54 di 134; 5 CLRBR (NS) 192; and 84 CLLC 16,004 (CLRBR no. 445):

*"...The role of the Board under s.185(g) of the Code is to ensure that discipline standards, which includes the basis for their application, the manner in which they have been applied and the results of their application are free from discriminatory practices. In performing that task the Board shall not, as stated previously, apply a standard that would negate the informality provided for in the constitutions of some trade unions. What the Board does expect though, are realistic, human and plausible explanations from trade unions for their conduct."*

(page 150; emphasis added)

In order to show that an unlawful distinction has been made, however, it is important to note that complainants must prove that the union was aware of its previous policy. Most often, this may be inferred from the facts. It may pose a problem for complainants, however, where they allege leniency in previous complaints which involve a vital union interest; see Tomislav Seselja, *supra*:

*"Although the board ... heard protracted evidence, most of it endeavouring unsuccessfully to establish that the union or its officers knew of other union members who had done the same thing as the complainant but were not disciplined ..."*

(page 2; emphasis added)

Therefore, once a complainant has made a case that distinctions have been drawn in the imposition of discipline or in a case of non-disciplinary expulsion or suspension,

the union must provide legitimate and non-discriminatory industrial-relations reasons for the distinction. The Board will not force an employee to prove that the union's motives were in fact discriminatory under the law, though proof of bad faith will no doubt help the complainant's case.

#### **D. Clarity and Knowledge of the Rule to be Applied**

The Board will not permit the imposition of discipline based on executive fiat. As outlined in McCarthy, supra there must be a general rule or policy. In addition, this rule or policy must be clear and known to those who are expected to follow it. In Camille Bernard et al. (1987), 70 di 118 (CLRB no. 635), the Board said the following:

*"The Board is of the opinion that, in the instant case, because of the manner in which they imposed a different interpretation of the collective agreement on the membership, without consultation and adequate communication with them, and because of an obvious lack of clarity in the directives and the autocratic way in which they applied disciplinary measures, the respondents contravened the provisions of section 185(g) of the Code."*

(page 127)

In Paul Hewitt et al., supra, the same position was expressed as follows:

*"Nevertheless, a trade union which wishes to undertake disciplinary action against its members must also take steps to ensure that union officers and union members are properly informed of their rights and responsibilities and that proceedings are conducted fairly. The failure to do so cannot serve as a defence against a complaint alleging a violation of the provisions of Section 185(g).*

*A trade union which wishes to take disciplinary action against some members for contravening a directive or decision must at least make a reasonable effort to ensure that the said directive or decision is implemented by all members to which it applies, to detect those who fail to comply and to deal with them equally. No union is or can be omniscient. However, it is not enough for a union to rely on rumour or hearsay to identify those persons who may fail to comply or to select persons against whom charges are to be laid in a haphazard manner "in order to make an example", as appears to have been the case here. This is particularly important where the charges were signed by local union officials, at least some of whom may have engaged in similar or identical conduct.*"

(page 4; emphasis added)

This is the very same rationale that is consistently used by arbitrators to rescind or reduce sanction imposed by employers. This parallel is often mentioned, not without some irony, by the Board; see Gerald Abbott, supra:

*"The thrust of this statement is that an individual should not be singled out for special treatment either in a decision to charge, the procedural format or the penalty. This is easily understood by trade unions which have vigorously defended their members to ensure that standards of industrial discipline imposed by employers are fair and non-discriminatory."*

(page 565; emphasis added)

Therefore, when the rule is unclear and there is legitimate doubt as to its scope of application, discipline based upon it is found to violate sections 95(f) or (g).

#### **E. Respect of the Union Constitution**

A union may breach its Constitution without acting in a discriminatory manner just as it may act in a discriminatory manner without breaching its Constitution (see Jim

Saunders, supra). Superior courts, not the Board, have jurisdiction to interpret the union Constitution and By-Laws and to force their strict application; see Pilette c. SPC, [1991] RJQ 1015 (SC):

*"The common law courts are the only ones entitled to interpret the terms and scope of the rules that bind the members to their union."*

(page 1019; translation)

However, the Board will not ignore an unlikely interpretation or violation of the union's Constitution, but rather will seek to appreciate, in conjunction with any other evidence, its significance in terms of discriminatory effect; see Mark Conlin (1994), 95 di 145; and 27 CLRBR (2d) 149 (CLRB no. 1088):

*"Although it is possible that inappropriate interpretations of the Constitutions by the designated officer of the union may corroborate other evidence of discrimination, an adverse interpretation of the Constitution, on its own, will not be interfered with by the Board nor will it ordinarily lead, without further evidence, to the conclusion that the adverse interpretation was invoked simply to discriminate against a specific individual."*

(page 149; emphasis added)

## **F. Breaches of Natural Justice**

In convening trial boards and conducting trials in disciplinary matters, unions will not be held under sections 95(f) and (g) to the same standards of natural justice as, a statutory tribunal. They must nonetheless observe the fundamental tenets of natural

justice; see Val Udvarhely (1979), 35 di 87; and [1979] 2 Can LRBB 569 (CLRB no. 200):

*"As a result, we must conclude that Mr. Udvarhely was not given a fair and impartial trial as stated in subsection (3) of article 9 of the union's Constitution. In so finding, we recognize that such disciplinary proceedings are not criminal trials and unions are not to be held to the same standards as courts. We must take into consideration the fact that the trial is being conducted by persons who have no legal training and that both prosecution and accused do not have the right to legal counsel but only to the assistance of fellow members at these hearings. Nevertheless, such tribunals must give fair hearings to an accused with minimal observance of the rules of natural justice."*

[...]

*We have come to the conclusion that Mr. Udvarhely was not given a fair and impartial trial as required by Section 3 of the union's Constitution. Since all members must be treated impartially, we can only conclude that Section 3 of Article 9 has been applied in a discriminatory manner to Mr. Udvarhely. We therefore find that the Union has violated Section 185(g) of the Code. In view of this finding, it is unnecessary to rule on the complaint insofar as it relates to paragraph 185(f) of the Code as the remedy would be the same."*

(pages 95-96)

In reaching to this conclusion, the Board in Val Udvarhely, *supra*, cited and approved the following test, developed by the Privy Council, for bias of a union tribunal; see White v. Kuzych, [1951] 3 D.L.R. 641:

*"Whatever the correct details may be, their Lordships are bound to conclude that there was, before and after the trial, strong and widespread resentment felt against the respondent by many in the*

union and that Clark, amongst others, formed and expressed adverse views about him. If the so-called 'trial' and the general meeting which followed had to be conducted by persons previously free from all bias and prejudice, this condition was certainly not fulfilled. It would, indeed, be an error to demand from those who took part the strict impartiality of mind with which a judge should approach and decide an issue between two litigants - that 'icy impartiality of a Rhadamanthus' which Bowen L.J. in *Jackson v. Barry R. Co.* [1893] 1 Ch. 238 at page 248, thought could not be expected of the engineer-arbitrator - or to regard as disqualified from acting any member who had held and expressed the view that the 'closed shop' principle was essential to the policy and purpose of the union. What those who considered the charges against the respondent and decided whether he was guilty ought to bring to their task was a will to reach an honest conclusion after hearing what was urged on either side, and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct."

(emphasis added)

In Val Udvarhelyi, supra, the Board concluded as follows:

"Because of the publicity which surrounded the Bob Smeal affair, we are convinced that most of the CALFAA members who deliberated on Mr. Udvarhelyi's appeal had, at one time or another, expressed or formed an opinion on the whole affair. We are of the opinion that these members could nevertheless sit in deliberation as provided by the Constitution. We have no proof, to use the words of the Privy Council, that "those who considered the charges against the respondent and decided whether he was guilty, did not bring to their task... a will to reach an honest conclusion". We view the case of the members who had signed the charges and who sat in deliberation quite differently. In the instant case, it has been proven that at least five persons who had laid the charges on which

*Mr. Udvarhely was tried at the convention, did participate in the deliberations and the ensuing vote."*

(page 95)

The burden of proof on the complainants in this regard appears clearly here. This result is mandated by the practical impossibility of attaining a high degree of impartiality when choosing members of a trial board from the bargaining unit to which the accused belongs.

#### **G. Remedies**

Pursuant to sections 99(1)(e) and (f), the Board has the power to grant the remedy sought by the complainants.

#### **VI. DECISION**

A secondary picket line by a rival union, the IBEW, caused confusion among certain employees as to their obligations as members of the TWU. The TWU members in question were told that they were free to respect the IBEW picket line according to their conscience. Whether or not this confusion was cleared up on the second or third day of the picketing, 19 TWU members felt that they did not have to honor the picket line because it was put in place by a competitor. This was a conscious choice on their part. Other TWU members were allegedly able to work without having to directly cross the picket line. Subsequently a petition was circulated requiring that all persons who worked that day be subject to union discipline. At a meeting that was held soon after the incident, sanctions were sought only against those who openly crossed the picket line. It seems clear that the Union, after being pressured by the members, sought to make an example of the complainants.

It is appropriate for the purpose of analysis to divide the complainants' allegations into the six following groups.

## **1. Confusion**

The complainants alleged that the confusion in the directions given to them vitiated the sanctions that were subsequently imposed.

It would indeed seem arbitrary and unreasonable to impose a penalty for violating the union constitution when serious doubt was created as to the complainants' obligations thereunder. If the Board finds that this serious doubt did indeed subsist for the duration of the IBEW action, it follows that the Union arbitrarily singled out individuals for punishment when no rule had clearly been established. The Union will have acted in a discriminatory manner and have violated sections 95(f) and (g).

If, however, the Board finds that the doubt was lifted after the first day, then the sanction for disobeying a union directive could be legitimately imposed, regardless of the fact that the picketer was a rival union.

It is unclear whether or not there was sufficient doubt on November 3 and 4 to warrant discipline. Union rules against crossing picket lines are notorious and many individuals apparently managed to understand the rule from day one and to respect the line, but this proves little without further detail about who said what to whom regarding the obligations of TWU members to honor the picket line. The Union, for its part, did not explain precisely when and how the confusion was cleared up. It simply dismissed the allegations regarding the events of November 2 as irrelevant. It is perhaps revealing in this regard that the convention trial board made no mention of the complainants having been informed of their responsibilities by the Union. In

its decision, it sought instead to place the responsibility on the complainants to make enquiries after November 2. It is also important in this regard to note that the door was propped open most of the time during the three days and that Judy Say made this arrangement and apparently declared that members could make their own decision according to their conscience. Moreover Judy Say testified that she never attempted afterwards to change their minds on this even when bumping into the complainants, at the doorstep of the back door, where as a "pack" they were "crossing the picket line".

## **2. Discrimination in Selection**

The complainants alleged that those persons who did not openly cross the picket line were not punished and that this constitutes discrimination. The pressure put on the executive at the meeting caused it to act only against the 19 who openly crossed the picket line.

It appears clearly from the wording of the formal charge that its authors sought disciplinary measures against a larger group than that which was actually brought to trial. For this reason, as corroborated by Peter Massy who testified for the Union, it has been proven to the satisfaction of the Board that other TWU members did in fact manage to be paid for these days without openly crossing the picket line.

Nowhere in its written representations did the Union refute these allegations. In fact, it seems to misunderstand them by focusing on the fact that all the accused received individual letters in the mail. This is not an issue of notice. Elsewhere, the Union attempted to ignore those allegations by stating that it knows of no other persons who violated the Constitution in any way, whereas the question of members being redeployed was clearly broached at the meeting November 15.

The charge is clearly aimed at all individuals who worked the days in question, whether or not they openly crossed the picket line. Whether or not this practice violates article XVIII(B)(2)(a) of the Constitution - this article arguably takes away all discretion from the Union executive once charges are made - there have clearly been distinctions drawn in the selection of those charged.

At the hearing, the Union did not explain satisfactorily the distinctions it drew in this respect. It argued that it had retained a discretion to charge despite its lack of power to do so on its own and that there was no violation of the Constitution on the part of those who did not cross the picket line. It also suggested that its institutional interests only required that it penalize those who had openly defied the picket line and not those who were otherwise able to work for money during the picket without anyone knowing.

In the present case, however, the facts do not bear out these contentions. The Union imposed a fine which was calculated by multiplying 70% of the employee's daily wages by the number of days worked during the IBEW picket whereas the maximum fine allowed under Article XVIII of the Constitution is \$1000. There was no expulsion or suspension imposed as a penalty. The complainants were suspended because they had refused to pay the fines imposed. In the circumstances, it is fair for this Board to conclude, as did the Union, that the protection of the Union's interest only required putting the supposed violators on the same pecuniary footing as those who respected the picket line and did not work for money. There can thus be little legitimate rationale for distinguishing between those who crossed openly and those who found another means of working. Again, this was clearly the position of the authors of the formal charge.

The real reason for singling out the complainants remains a mystery. But, given that the charges followed the meeting of November 15, it seems clear that political pressure played a part. Questions of expediency may also have influenced the union's executive in its decision to follow through on the charge only against the complainants. In any case, there was no evidence presented to the Board that the union executive had made more than a cursory inquiry into the events of November, 2, 3 and 4.

In these circumstances, where the stated rationale for the distinction does not exist, the decision taken by the Union does not bear a fair and rational relationship with the rationale for the rule. It therefore appears arbitrary and unreasonable to choose to apply the rule to one group and not to the other in a seeming violation of the Union Constitution. Since the protection accorded by sections 95(f) and (g) extends to the selection of those to be disciplined (see Gerald Abbott, Paul Hewitt et al., supra), the action in question thus violates these sections on this ground also.

This is not to say, however, it is legitimate for the Union to act against employees who cross openly and not against those who work elsewhere by reason of its legitimate interests. In other circumstances, the distinction may be found to have a rational connection to the rule and the violation of the constitution might be characterized as technical. In the present case, however, the rationale offered is a mere pretext.

### **3. Illegality of the Charge**

The Union probably did not respect the Constitution when it charged the complainants because they were not specifically named in the charge. The failure to name the

individuals means that the Union had to investigate the allegations and decide whom it had to charge.

The Constitution, while not specifically setting out the requirement that the individuals be named in the formal charge, clearly supposes this to be the case because, according to the Union's own interpretation of the Constitution, the Union has no power to charge of its own accord. As all 12 complainants admit to having crossed the picket line, however, this seems a minor point which does not raise an issue of discrimination.

#### **4. Previous and Subsequent Violators Were Not Punished**

The complainants made vague allegations that no action was taken against individuals who did precisely the same thing as they did, namely cross a secondary picket line and work behind it.

The Union replied unabashedly to these charges by saying that, according to the Constitution, it has no power to charge members on its own but that a formal charge must be made by at least two members.

The facts surrounding these two incidents are very unclear. It is dangerous to compare situations which are not comparable and the complainants logically bear the burden of proving that these situations are similar enough in essential aspects so as to warrant a conclusion of discrimination. Similarly, given that one of the events occurred 10 years previously and the other subsequently and that it is not clear from the written record that the subsequent event even concerned members of Local 21, this is not a case where knowledge of the other events should be imputed to the Union without further proof from the complainants (Tomislav Seselja, supra).

On the other hand, while not admitting that it knew of the other events, the Union made no attempt whatsoever at distinguishing them from the facts of this case except to say that it has no power to charge on its own and that in the other cases no one filed a formal charge. This argument is plausible in theory, but if knowledge of the events is assumed, it is somewhat disingenuous insofar as it seems clear that the impetus for the trial board was the meeting, and not the formal charge. Moreover, there can be little doubt that the executive would have little problem in organizing the filing of charges were it to so decide. At the meeting of Local 21, held on November 15, 1993, for example, a motion was passed "to go to a trial board" concerning the 19 individuals who openly crossed the picket line. Following this meeting, the Union apparently had no difficulty deciding whom to charge and whom not to charge from among the individuals described in the formal charge.

In the result, however, the Board finds it is not possible to make strong conclusions on this point without further proof from the complainants (e.g. proof of discriminatory motives). Moreover, given the importance of the Union's interest in ensuring the respect of picket lines, the Board should not come too hastily to a decision that would effectively strip the Union of its power in this regard without firm proof that the situations were not distinguishable and that the Union knew what it was doing.

#### **5. The Union Violated Article XXXVI(5) of the Collective Agreement**

The complainants made two different allegations based on this article. First, they claim that the Union did not make a prompt investigation nor make every effort to obtain clearance from the affected Union. There is no proof of this in the file and none was adduced at the hearing. Moreover, its relevance is marginal in any case. If true, it goes to proving the Union's general bad faith and has some bearing on the

clarity of the rule, but it has no direct bearing on the discriminatory nature of the disciplinary sanctions imposed on the complainants.

Second, the complainants submitted that the secondary picketing was clearly illegal and that the picket lines should have been disregarded. This argument is not relevant either. The issue, as the Union correctly submitted, is not whether the picket line was illegal but rather who has the power to declare that it is illegal. The collective agreement, by which all employees are bound, clearly gives this power to the Union President. Whether or not a court or board later determines that a picket is illegal, the issue is whether the Union can command obedience in the meantime. It is perhaps possible to imagine a situation where picketing would be so clearly illegal that the President's decision to obey it could be inferred to be taken in bad faith. Any disciplinary measures based on refusal to honour the picket would therefore be discriminatory and unreasonable. But such circumstances do not seem present upon consideration of the representations. Moreover, the need for the Union to command obedience in times of collective action clearly mandates that discipline be imposed regardless of a subsequent court or labour board decision.

Even if this last argument were relevant, it has not been proven that the picket line was illegal. While secondary picketing is indeed illegal in British Columbia, its definition is by no means straightforward. It is necessary, most notably, to make a determination as whether or not it is indeed a third party's premises and then as to whether that third party is an ally (see The Bay BCLRB No. B102/95 March 10, 1995).

## **6. The Union Violated Principles of Natural Justice**

First, while it is true that the Union did not have a standing trial board as required by Article XVIII of its Constitution, it nonetheless appointed the members of the trial board in accordance with that article. It is hard to see how this irregularity contributed to any discrimination that the complainants might have suffered unless the complainants can show that the individual members on the trial board were likely biased given the circumstances of their nomination.

Second, regarding the minutes of the Union meeting, it is to be noted that, according to these same minutes, there were 58 members of the local present that night. Given the content of the resolutions and the recommendations, this might be enough to raise a presumption that there was bias throughout the bargaining unit. However, at the same time, the mere fact that 58 members were at the meeting does not prove that the members of the trial board were present at the meeting and even less that they voted in favour of the resolution which recommended punishment.

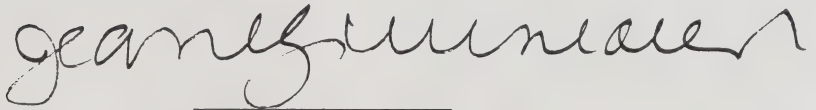
Also, Article XVIII(b)(2)(i) of the Constitution offers the possibility for the accused to apply on grounds of partiality to have their trial board moved outside Local 21. Without speculating as to the complainants' motives for not doing so, it seems fair for the Board to infer that the partiality of their trial board was not so flagrant or inevitable that the complainants had to seek impartiality elsewhere. Moreover, the submissions of the complainants, at each level of appeal, denote that they took the procedure at least somewhat seriously.

The allegations of the complainants in this regard are thus serious but are not established by the evidence adduced. In light of Val Udvarhelyi, *supra*, the complainants had to prove that the trial board was composed of individuals who "did not bring to their task ... a will to reach an honest conclusion" or that their accusers were among those who tried them. This burden has not been met.

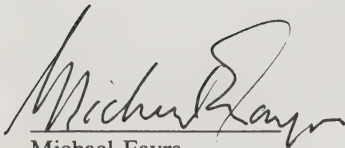
### VIII. CONCLUSION AND ORDER

The Board concludes that, given the ad hoc and seemingly arbitrary selection of those to be disciplined and given the state of confusion that prevailed during the three days of picketing, for the union to impose disciplinary measures on the complainants constitutes a violation of sections 95(f) and (g).

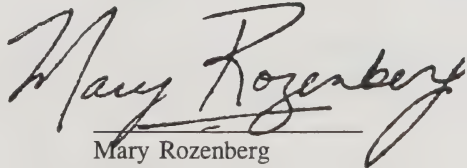
Pursuant to sections 99(1)(e) and (f) of the Code, the Board therefore orders that the fines imposed on the complainants be rescinded and that the complainants be reinstated as members in good standing of the Telecommunications Workers Union.



Jean L. Guilbeault, Q.C./c.r.  
Vice-Chair



Michael Eays  
Member



Mary Rozenberg  
Member



# information

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## Summary

David Hyde, *complainant*, National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), *respondent*, and Canadian Pacific Limited, *employer*.

Board File: 745-5140  
CLRB/CCRT Decision no. 1164  
May 29, 1996

The complainant alleged that his seniority as an engine attendant was miscalculated by Canadian Pacific Limited upon his transfer from Brandon to Moose Jaw. He filed a complaint with the Board alleging that CAW, through the actions of its representatives, had breached section 37 of the Canada Labour Code.

CAW argued that it had not breached its obligations and that it had made reasonable efforts in investigating the complainant's claim.

CAW must manage seniority lists emanating from the consolidation of seven collective agreements. The management of these seniority lists varied widely.

Mr. Hyde's grievance was filed at the local level and was rejected. Following investigation, CAW advised the officers of Mr. Hyde's Lodge that CAW would not pursue the matter. There was no evidence that CAW had acted in an arbitrary or discriminatory manner or in bad faith. Consequently, the complaint is dismissed.

## Résumé

David Hyde, *plaignant*, Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada), *intimé*, et Canadien Pacifique Limitée, *employeur*.

Dossier du Conseil: 745-5140  
CLRB/CCRT Décision n° 1164  
le 29 mai 1996

Le plaignant prétend que Canadien Pacifique Limitée a mal calculé son ancienneté en tant que préposé aux locomotives au moment de son transfert de Brandon à Moose Jaw. Dans sa plainte déposée auprès du Conseil, le plaignant allègue que son syndicat, par l'intermédiaire de ses représentants, a enfreint l'article 37 du Code.

Le syndicat soutient qu'il n'a pas manqué à ses obligations et qu'il a fait des efforts raisonnables lors de l'enquête sur l'allégation du plaignant.

Le syndicat doit gérer des listes d'ancienneté qui ont été dressées à la suite du regroupement de sept conventions collectives. La gestion de ces listes varie grandement.

Le grief de M. Hyde a été déposé auprès de la section locale et a été rejeté. À la suite d'une enquête, le syndicat a informé les dirigeants de la section locale de M. Hyde qu'il ne donnerait pas suite au grief. Rien dans la preuve n'indique que le syndicat ait agi de façon arbitraire ou discriminatoire ou qu'il ait fait preuve de mauvaise foi. Par conséquent, la plainte est rejetée.

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## Reasons for decision

David Hyde,

*complainant,*

*and*

National Automobile, Aerospace,  
Transportation and General Workers Union of  
Canada (CAW-Canada),

*respondent,*

*and*

Canadian Pacific Limited,

*employer.*

Board File: 745-5140  
CLRБ/CCRT Decision no. 1164  
May 29, 1996

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Michael Eayrs and David Gourdeau, Members. A hearing was held on January 5, 1996, at Regina, Saskatchewan.

### Appearances

Mr. David Hyde accompanied by Mr. Ron Cochrane, Union Representative, for the complainant;

Messrs. Brian McDonagh, National Representative, CAW-Canada, Glenn Michalchuk, Regional Vice-President Local 101, CAW-Canada, and Jim Munch, former General Chairman International Brotherhood of Firemen and Oilers, for the Respondent Union; and

Messrs. Glen D. Wilson, Solicitor, CP Rail System, and K.E. (Ken) Webb, Manager, Labour Relations, CP Rail System, for the Employer.

These reasons for decision were written by Mr. David Gourdeau, Member.

Mr. David Hyde alleged, in a complaint filed with the Board on July 31, 1995, that his Union, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) - (the Union or CAW), violated section 37 of the Canada Labour Code by failing to represent him properly with respect to his grievance concerning his seniority date as an engine attendant with Canadian Pacific Limited (the Employer) and by dealing with this grievance unfairly and in a totally unacceptable manner.

In essence, Mr. Hyde complained that the Union had not considered and dealt with his seniority in a fair and acceptable manner and, consequently, it had arbitrarily refused to pursue his grievance.

## I

At the outset of the hearing, the parties accepted the facts set out in the investigating officer's report. During the hearing, they submitted additional testimony as well as their written presentations before giving their respective testimonies. The relevant facts are summarized as follows.

In July 1985, the Board received from the International Brotherhood of Firemen and Oilers (IBFO) an application for review of the certifications held on its behalf by the Canadian Council of Railway Shopcraft Employees and Allied Workers (the Council) with the Employer. The IBFO sought to substitute itself for the Council as the bargaining agent. This application was granted on January 17, 1986 (files 530-1251 and 530-1252).

In May 1990, the Employer applied to the Board to consolidate seven shop craft bargaining units in one unit. On July 9, 1992, the Board granted the Employer's application and, in July 1993, ordered a vote in order to determine the certified bargaining agent. This vote was counted in April 1994. The CAW achieved a majority

and on April 22, 1994, the Board ordered that it be certified as the bargaining agent for:

*"all employees of Canadian Pacific Limited and its subsidiaries employed in the locomotive department, car department and operating department and designated as tradesman, apprentice, helper, engine attendant and shop labourer."*

(file 530-1848)

The current collective agreement expires in December 1997. The previous agreement expired on December 31, 1993. The parties were in negotiations for the renewal of this agreement until the spring of 1995, when Mr. Justice Adams was appointed arbitrator to resolve all outstanding issues. Mr. Justice Adams issued his award on June 14, 1995 and the new agreement became effective July 16, 1995. The new agreement did not amend any of the seniority provisions which affected the merits of Mr. Hyde's complaint.

Mr. Hyde first started to work for the Employer in November 1978 as a clerk in Brandon, Manitoba. After being laid off, he bid on and was appointed to a position in the Brandon diesel shop. He started in the diesel shop on February 3, 1988. Mr. Hyde worked four hours per day as engine attendant and four hours as labourer. In December 1990, the Employer posted a bulletin for positions in the Brandon bunkhouse. Mr. Hyde bid on these positions and was awarded one in January 1991.

On September 30, 1994, the Employer posted a bulletin for four engine attendant positions in Moose Jaw, Saskatchewan. On October 4, 1994, Mr. Hyde applied for these positions and was successful in obtaining Job no. 18, namely that of an engine attendant. Mr. Hyde started working in Moose Jaw at the end of October 1994. He was at work for one week and was then off work for a week due to a sprained ankle. He then returned to work and was recertified as an engine attendant. He was told that his seniority as engine attendant would be calculated from the date he was recertified.

Mr. Hyde's current seniority date as engine attendant is November 10, 1994.

## II

The relevant provisions of the collective agreement concerning seniority are as follows:

### *"Article 5 Seniority*

*5.1 Except as provided for in Article 7, seniority of employees covered by this Agreement shall be confined to the seniority terminal at which employed and to the date of entry into the classification. Separate seniority lists will be maintained for the classifications of Stationary Firemen, Engine Attendant and Engine Attendant Helper at each seniority terminal where such classifications exist. Main shops will be regarded as forming part of the seniority terminal at which they exist.*

*5.2 Seniority lists shall be updated and posted at the headquarters locations of all employees concerned, on or before March 31, June 30, September 30 and December 31 of each year. A copy of said list shall also be furnished to the union representatives of the employees.*

*5.3 Seniority lists shall be open for correction for a period of sixty calendar days on presentation in writing of proof of error by the employee or his representative to the employee's immediate supervisor. Except by mutual agreement, seniority standing shall not be changed after becoming established by being posted for sixty calendar days following date of issue, without written protest.*

*5.4 For employees on layoff, leave of absence, annual vacation or absence because of illness or injury at the time of posting, the sixty (60) calendar day period prescribed in Article 5.3, shall begin on the date of return to service.*

*5.5 A new employee shall not be regarded as permanently employed until he has completed 65 days' cumulative service. In the meantime, unless removed for cause which, in the opinion of the Company renders him undesirable for its service, the employee shall accumulate seniority from that date and shall be regarded as coming within the terms of this Agreement.*

...

*Engine Attendants*

*5.14 A separate seniority list will be maintained for the classification of engine attendant at each seniority terminal where such classification exists.*

*5.15 An employee shall establish seniority as an engine attendant from the date assigned to a regular engine attendant position unless removed from this classification in accordance with the provisions of Article 5.5.*

...

*Article 7*

*Staff Reduction, Displacement and Recall*

...

*7.3 An employee who voluntarily occupies a position in a lower classification when there is a position in a higher classification in his seniority terminal to which his seniority would entitle him shall forfeit his seniority in such higher classification unless, under extenuating circumstances, it is mutually agreed otherwise between the proper officer of the Railway and the General Chairman."*

On January 19, 1995, Mr. Hyde filed a grievance with the Employer's Facility Manager in Moose Jaw, Mr. R. Jourdain. In his grievance, Mr. Hyde maintained that his seniority date should be February 3, 1988, when he started to work in the Brandon diesel shop. On February 9, 1995, the Employer's Human Resource Specialist, Mr. M.A. Rice, denied Mr. Hyde's grievance. On March 9, 1995, the Union's Local Chairman filed the grievance with Mr. Jourdain. On April 5, 1995, Mr. Rice once again denied the grievance.

On May 23, 1995, the Union's Regional Vice-President-Prairie Region, Mr. G. Michalchuk, wrote to the officers of CAW Lodge 204. In his letter, Mr. Michalchuk advised the officers that the Union had decided not to pursue Mr. Hyde's grievance. Mr. Michalchuk stated that, in accordance with Article 7.3 of

the collective agreement, Mr. Hyde had forfeited his engine attendant seniority when he took a position as labourer in the bunkhouse.

During the hearing, the Board heard from Messrs. Hyde and Munch about a conversation concerning the complainant's seniority or the forfeiture thereof should the complainant transfer from Brandon to Moose Jaw. Although uncertain as to the date of such conversation, Mr. Hyde admitted that it took place prior to his transfer.

### III

It is obvious from the evidence before the Board that the management of the seniority lists emanating from the consolidation of seven collective agreements is problematic and has varied widely in the past. This being stated, this method of managing the lists based on "local custom" seems to be known to and accepted by all concerned.

The Union submitted that it had made reasonable efforts in its investigation of Mr. Hyde's claim. It maintained that the collective agreement provides a mechanism for members to seek a change with respect to their seniority when new information becomes available indicating a change is warranted and that Mr. Hyde still had recourse under the collective agreement to correct the problems concerning his seniority date. The Union submitted that Mr. Hyde was asking the Board to review the Union's decision not to change his seniority date and that this does not fall within the purview of the Code.

The Union submitted that Mr. Hyde was asking for an adjustment of his own seniority. Therefore, it had to assess the validity of the complainant's claim. It maintained that, on the basis of its investigation into that claim, it had decided not to pursue Mr. Hyde's grievance. The Union stated that Mr. Hyde had vacated the position of engine attendant and, according to Article 7.3 of the collective agreement, he was not entitled to seniority as an engine attendant while in Brandon.

The Union indicated that it had been aware since January 1995 of an arrangement whereby at small locations, where labourers were employed, the IBFO and the Employer had agreed that labourers would perform or be available to perform engine attendants' duties as required and they would be paid four hours at the engine attendant rate and four hours at the labourer rate. These individuals would be given seniority as if they worked as full-time engine attendants. The Union denied that all labourers were classified as engine attendants in 1990. It also stated that once it became familiar with the issue, it acted on what it had learned. It maintained that the Regional Vice-President had contacted labourers at Swift Current and had advised them that to protect their seniority as engine attendants, they should ensure that they performed those duties.

The Union also drew the Board's attention to the fact that Mr. Hyde had access to an internal appeal procedure as outlined in its constitution and that this fact was communicated to the Union Representative in Moose Jaw. The Union also noted that Mr. Hyde had not availed himself of this procedure.

In response to the Union's submission, Mr. Hyde took exception with the Union's statement that the collective agreement contained provisions to which he had recourse. Mr. Hyde maintained that he had exhausted all avenues provided in the collective agreement, without any information from the Union. As for the Union's comments about the internal appeal procedure, Mr. Hyde stated that no one in Moose Jaw had a copy of the Union's constitution until after he had filed his complaint with the Board. Mr. Hyde also questioned the Union's assertion that there existed an agreement which allowed certain employees to work as labourers and earn engine attendant seniority. Mr. Hyde stated that he has never seen a copy of this agreement and he asked that the Union provide him with a copy. Mr. Hyde also challenged the Union's statement about what had occurred in Swift Current. He indicated that, with the exception of one individual, all employees have seniority in both the engine attendant and labourer classifications and that this seemed impossible because three positions in Swift Current were posted as bunkhouse attendants only. Mr. Hyde also

denied that he was only seeking an adjustment of his own seniority. He maintained that he could only file a grievance on his own behalf and that he did make note of how inconsistent the Union and the Employer had been in enforcing the collective agreement.

#### IV

The Board, having carefully examined all the evidence, reached the following conclusion.

In essence, the complaint turns on a difference of opinion between Mr. Hyde on the one hand, and the CAW and the employer on the other, with respect to the application of seniority provisions of the current collective agreement. In Mr. Hyde's opinion, his original service date in the Brandon diesel shop, prior to his transfer to the Brandon bunkhouse and subsequently to Moose Jaw, should apply when determining his seniority as an engine attendant. Both the CAW and the Employer disagreed and so informed him. Mr. Munch, former General Chairman of IBFO, advised Mr. Hyde prior to his transfer to Moose Jaw that he would forfeit his seniority if he were to go to Moose Jaw. Nonetheless, Mr. Hyde accepted the transfer.

A trade union exercises broad discretion in deciding whether it will file a grievance and proceed to arbitration. See Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509. However, in making such decisions, it must not act in a manner that is arbitrary, discriminatory or in bad faith.

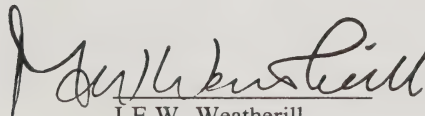
The main aspect of Mr. Hyde's complaint is a disagreement over the interpretation of the collective agreement with respect to the further handling of his grievance.

However, disputes between members and their union about the proper interpretation of a collective agreement are not a proper basis for a section 37 complaint.

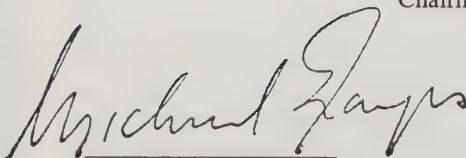
The Union may refuse to file a grievance or to proceed to arbitration if it disagrees with the members' interpretation of the agreement. See Gino Giammarino (1993), 93 di 145 (CLRB no. 1047); and D.M. Hlady and J.N. Harris (1993), 93 di 8 (CLRB no. 1034). Even where the Board reaches a different conclusion from that of the Union regarding the interpretation of the collective agreement, the Board will not substitute its own decision nor will it pass judgment on the Union's decision (see Frank C. Melia (1983), 53 di 140 (CLRB no. 423)). The Board's role is to look at the manner in which the Union handled a grievance or request that a grievance be filed to ensure that it does not exercise its exclusive authority unfairly, discriminatorily or in bad faith.

In the present case, the Union considered the issues raised by Mr. Hyde and later submitted a grievance on his behalf. Once the Union had fully investigated and reviewed all the facts, it decided not to proceed to arbitration. Based on the foregoing, the Board is of the view that there is no evidence that the Union acted in a manner that can be construed as arbitrary, discriminatory or motivated by bad faith.

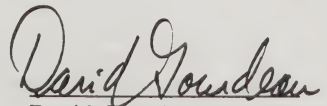
Thus, the Board finds that the Union did not breach section 37 of the Code in its representation of the complainant and therefore, by unanimous decision, dismisses the complaint.



J.F.W. Weatherill  
Chairman



Michael Eayrs  
Member



David Gourdeau  
Member



# Information

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## Summary

Pavel Navratil, represented by the International Longshoremen's and Warehousemen's Union, Local 500, complainant, and Canadian Stevedoring Co. Ltd., respondent.

Board File: 950-326  
CLRB/CCRT Decision no. 1165  
June 6, 1996

## Résumé

Pavel Navratil, représenté par le Syndicat international des débardeurs et magasiniers, section locale 500, plaignant, et Canadian Stevedoring Co. Ltd., intimée.

Dossier du Conseil: 950-326  
CLRB/CCRT Décision n° 1165  
le 6 juin 1996

Complaint pursuant to section 133 of the Canada Labour Code (Part II - Occupational Safety and Health), alleging violation of section 147 of the Code.

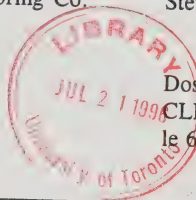
A longshoreman working as a regular work-force electrician parked the cab of a gantry crane in an unsafe manner, descended from it and then refused to climb back into it in order to reposition it, claiming that it was unsafe. He was fired on the spot by his foreman. The safety officer called in to investigate the matter issued a decision concurring with the employee's concerns that an unsafe work condition existed. The employer did not deny that the situation was unsafe, nor did it appeal the safety officer's decision.

The Board accepted the employer's argument that the employee, who was an experienced electrician, had been negligent in parking the cab in such an unsafe manner. However, the Board also found that since the employee had been fired without having had the opportunity to even consider using certain devices, which in the past had proven to make access to work areas safe, or without having been directed to

Plainte fondée sur l'article 133 du Code canadien du travail (Partie II - Sécurité et santé au travail), alléguant violation de l'article 147 du Code.

Un débardeur, qui occupait un poste d'électricien permanent, a stationné la cabine d'une grue-portique en position non sécuritaire, en est descendu, puis a refusé d'y remonter pour la replacer, alléguant que l'accès était dangereux. Il a été congédié sur-le-champ par son contremaître. L'agent de sécurité dépêché pour faire enquête a rendu une décision donnant raison à l'employé quant à l'existence d'une situation dangereuse. L'employeur n'a pas nié qu'il existait une situation dangereuse et n'a pas interjeté appel de la décision de l'agent de sécurité.

Le Conseil accepte l'argument de l'employeur selon lequel l'employé, qui est un électricien chevronné, a fait preuve de négligence au moment de stationner la cabine en position non sécuritaire. Cependant, le Conseil estime que, puisque l'employé a été congédié sans même avoir eu l'occasion d'envisager la possibilité d'utiliser certains outils qui, dans le passé, s'étaient avérés rendre l'accès aux aires



use such devices, the employer had not taken every reasonable precaution for the protection of the employee. Thus, it could neither rely on the employee's bad faith nor on the "just cause" aspect of the dismissal to show that the complainant was not discharged because he was acting in compliance with the Code.

The complaint is allowed and the employer is ordered, pursuant to the Board's remedial powers under section 134(b) of the Code, to reinstate the complainant in his regular work-force electrician's position. However, in view of the fact that to a large extent, the employee was the author of his own misfortune, the reinstatement is ordered without financial redress.

de travail sécuritaire, ou sans recevoir d'instructions à cet égard, l'employeur n'a pris toutes les précautions raisonnables pour assurer la protection de l'employé. Conséquemment, l'employeur ne pouvait invoquer la mauvaise foi de l'employé ou encore le caractère "juste et suffisant" du congédiement pour établir que celui-ci n'a pas résulté de l'exercice, par le plaignant, de ses droits en vertu du Code.

La plainte est accueillie. En vertu de ses pouvoirs de redressement que lui confère l'alinéa 134b) du Code, le Conseil ordonne à l'employeur de réintégrer l'employé dans son poste d'électricien permanent. Toutefois, étant donné que dans une large mesure, celui-ci a été l'artisan de son malheur, cette réintégration est ordonnée sans indemnisation.

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## Reasons for decision

Pavel Navratil,

*complainant,*

*and*

Canadian Stevedoring Co. Ltd.,

*respondent.*

Board File: 950-326

CLRB/CCRT Decision no. 1165

June 6, 1996

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The Board was composed of Ms. Véronique L. Marleau, Member, sitting alone pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on January 22, 1996, at Vancouver.

### Appearances

Mr. Chuck Zuckerman, Business Agent, International Longshoremen's and Warehousemen's Union, Local 500, for the complainant; and

Mr. J.A. Genest, Manager - Labour Relations, British Columbia Maritime Employers Association, for the respondent.

### I

The Board is seized of a complaint filed pursuant to section 133 of the Canada Labour Code (Part II - Occupational Safety and Health), alleging that the respondent employer, Canadian Stevedoring Co. Ltd. (Canadian Stevedoring), disciplined the complainant in contravention of section 147 of the Code.

The complainant was dismissed from his position of regular work-force electrician by Canadian Stevedoring following an incident that occurred during the evening shift on July 28, 1995. The complainant had been assigned to do maintenance work on a

gantry crane and was fired after having refused to climb back into the cab of the crane. He alleged that it was unsafe to do so because of the particular positioning of the crane's trolley. Since he believed he had legitimate safety concerns and he had been fired as a result of his refusal, the complainant submitted that this amounted to a violation of section 147 of the Code.

The relevant portions of section 147 are as follows:

*"147. No employer shall*

*(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee*

*...*

*(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."*

## II

The complainant became a certified electrician in 1961 and was registered as a longshoreman in 1982. He has since then worked on the waterfront and was hired by member companies of the British Columbia Maritime Employers Association (BCMEA).

The incident giving rise to the complaint occurred on July 28, 1995. Mr. Navratil reported for work on the 1630 shift as a regular electrician assigned to the dock gantries. An electrician is on stand-by in case any repair work must be performed on the dock gantry servicing the vessel. Mr. John Shankar was the Canadian Stevedoring foreman in charge and the complainant's supervisor that night. The relationship between Mr. Shankar and the complainant had been strained for some time. Mr.

Shankar had not been satisfied with Mr. Navratil's work and a letter of reprimand was written against the complainant. Mr. Navratil admitted that he was extremely upset with the letter of reprimand of July 26, 1995 which, as alleged by the BCMEA, resulted from two incidents in which Mr. Navratil had failed to follow the proper shutdown procedures in servicing the dock gantry cranes. The complainant was fully aware that Mr. Shankar was in part responsible for the letter as he was the one who had reprimanded the complainant on July 24, 1995, following the second incident.

Later on, Mr. Shankar asked the complainant to service the spreaders, an operation which is done from the crane's cab. The container spreaders are serviced at either of the two ends of the girder where the trolley stops automatically. The two automatic stops occur just to the south of the north legs. Servicing the spreaders in these positions allows the electrician access to the crane cab using the entrance/exit platform. The spreaders are not normally serviced at the forward slowdown limit point which only permits the electrician to exit the crane cab through a trap door. However, this occurs on rare occasions. All electricians who have been trained on the dock gantries are fully aware of these positions. In this regard, Mr. Navratil, who is an experienced and trained electrician, did not deny that as a regular work-force electrician who has performed these manoeuvres on a regular basis for years, he instinctively knows when the crane is in the proper stop position for exiting safely. The evidence also confirmed that Mr. Navratil is very familiar with gantry crane 2 at issue here, as he has been servicing it since 1985.

Mr. Shankar directed Mr. Navratil to move the trolley to the north area between the legs, as the traffic was flowing through the south lane of the crane. According to the employer, the understanding was that because of the manner in which it is always done, Mr. Navratil would trolley to the extreme north to the automatic stop. When Mr. Navratil stopped trolleying, Mr. Shankar assumed that he had reached that point as at the time there was no reason to suspect he would stop anywhere else. Mr. Navratil had in fact stopped between the slowdown limit point and the automatic

stop position. Mr. Shankar only noticed this after the complainant had exited the crane cab.

There is no doubt that having parked the crane in that position, the complainant placed himself in an unsafe situation. He stopped the trolley before the automatic stop and then exited from the cab when he could see that it was not at the usual position for exiting in a safe manner. As the complainant stated, in order to exit in this position, he had to exit onto a small platform, climb a ladder to the trolley car above the cabin and crawl under the machine house looking for a way to the catwalk leading to the elevator.

Mr. Navratil claimed that he only realized that he had not parked the crane in the proper position after leaving the cab. He said that he did not know how this had happened and that he had only followed his foreman's instructions. According to the complainant, he realized what he had done was dangerous when he attempted to retrace his route to re-enter the cab. He descended from the gantry and reported the condition to his foreman who told him to try the trap doors. He again climbed onto the gantry and tried to enter the cab through the two trap doors but that was not possible. One trap opened directly above the dock, approximately 100 feet below. The other trap door was above the trolley platform but too far away to descend safely.

According to the complainant, Mr. Shankar then asked him if he would go to the crane cabin or not. The complainant replied: "It is unsafe to get into the cab with the trolley parked in this position, and under the Canada Labour Code I want to invoke my right to refuse dangerous work." At that point, Mr. Shankar told the complainant that he was fired.

Mr. Shankar had a slightly different recollection of the events. He maintained that he had asked the complainant the following question: "Why did you leave the trolley in such a spot if you cannot get back?", to which the complainant had replied that he did not know. Mr. Shankar claimed that he had then asked the complainant to check the

trap door to see if he could get through, which he did but found it was not within easy reach. Mr. Shankar had then told the complainant to retrieve that trolley and, since he had created the situation, not to expect anyone else to correct it for him. The complainant, therefore, would have to do something to retrieve the trolley. To this the complainant had replied that he was not going to do anything as it was not his problem; it is at this point that Mr. Shankar had fired the complainant.

It is not clear at what point the complainant indicated that he was refusing to work. The complainant alleged that he was fired immediately after advising his foreman that he was invoking his right under the Code to refuse dangerous work, and that no investigation was carried out by the respondent into his refusal to work prior to him being fired. He claimed that he had then contacted his union. When Mr. Chuck Zuckerman, the union's business agent, arrived to investigate the refusal, he was informed by Mr. Shankar that the complainant had been fired and that his replacement was on his way. Mr. Zuckerman stated that after having spoken to Mr. Navratil he went to the top of the dock gantry to investigate the matter. He found that there was no proper entrance to the cab of the dock gantry. The only way to reach the platform on which a person could crawl through a passageway to the cab was either to step onto some slippery cables without any fall arrest device in place or to jump approximately six feet to the platform.

Mr. Zuckerman stated that he had then gone back to the foreman's office at approximately 2000 hours and had requested that Mr. Navratil be provided with a lowering harness or a ladder. He was told that although there was a lowering harness in the office, it was not necessary because the complainant had been replaced.

Mr. Zuckerman then contacted the BCMEA, and its representative, Mr. Tony Genest, came to the site. The replacement electrician arrived and was assigned other work, i.e., checking the limit switches of the gantry and working in the shop for the remainder of the evening.

Discussions ensued between the employer and union representatives with a view to resolving the issue, but these efforts were unsuccessful. At approximately 2130 hours, they contacted a safety officer from the Coast Guard. Captain John Houd was dispatched to the site to investigate the safety complaint. He issued a decision that concurred with Mr. Navratil's concerns that an unsafe work condition existed:

*"To terminal operators:*

*Refusal to work by electrician to re-board cab on gantry crane. On inspection, cab was found to be parked in an unsafe manner.*

*To park cab in a safe way it must be brought forward to the water until it stops or driven under trap door of cabin.*

*Means must be taken to ensure that all crane operators know exactly where to park cab for maintenance purposes."*

The employer did not appeal this decision to the Regional Safety Officer. Mr. Genest told the Board that it would not have made any difference since these instructions were already followed. By letter dated July 31, 1995, Mr. Greg Scott, Canadian Stevedoring's Manager, Equipment Department, confirmed to the union that Mr. Navratil had been fired "for improper work procedures and unsafe work practice."

### III

The issue before the Board is whether the complainant was improperly fired after claiming that the access to his work area was unsafe.

The employer submitted that it had not breached the provisions of the Code. Although it did not dispute the fact that access to the complainant's work area, namely the gantry crane, was unsafe at the time of the refusal, the employer submitted that the complainant had caused the safety problem by positioning the crane as he had done. As an experienced electrician, there was no excuse whatsoever for Mr. Navratil's action. The only logical explanation was that he had done it to cause obstruction and

to undermine the authority of his foreman, Mr. Shankar, in direct retaliation for the letter of reprimand Mr. Shankar had recommended be sent to him. Accordingly, it was for creating this situation and, in so doing, contravening not only the provisions of the collective agreement, but also the provisions of sections 126(1)(b), (c) and (d) of the Code (dealing with duties of employees with respect to occupational safety and health) that the complainant had been terminated.

The union, for its part, argued that Canadian Stevedoring had not followed the Code's procedure with respect to investigating unsafe conditions. They fired Mr. Navratil prior to investigating the matter; in violation of the Code. The union submitted that if the employer had recognized that the access was unsafe, the complainant should not have been denied access to a ladder or to a safety harness. In this regard, it is noteworthy that when asked by the Board whether he could have accessed the crane cab safely using certain tools such as a ladder or a harness, the complainant agreed, but pointed out that he was not given any time or opportunity to consider such options as he was fired immediately after refusing to climb back into the cab.

#### IV

Section 128(1) of the Code gives employees who have reasonable cause to believe that a dangerous condition exists in any place the right to refuse to work, and section 147 makes it an offence for an employer to punish employees for exercising this right. An employee's right to complain of such breaches is set out in section 133(1) of the Code.

Pursuant to section 133(6) of the Code, in this type of cases, an alleged contravention of section 147(a) by an employer is itself evidence that a contravention actually occurred, and if the employer alleges that there was no contravention, the employer must prove this. In order to meet this onus, the employer must establish that the disciplinary action had nothing to do with the fact that the employee exercised his

right to refuse under the Code, once the employee has satisfied the Board that he had reasonable cause to believe that a dangerous condition existed.

In the instant case, there is no dispute that the access to the cab of the gantry crane was unsafe and that the complainant was dismissed after having refused to attempt this access. In this context, therefore, to conclude that the complainant was not dismissed because he had acted in accordance with section 128(1) of the Code, the employer must convince the Board, on the balance of probabilities, that its decision to dismiss the complainant had nothing to do with the fact that he had a reasonable cause to believe that a dangerous situation existed.

To discharge its burden of proof, therefore, the employer must convince the Board that the employee was not disciplined because he had refused to perform unsafe work, but rather because he had behaved in a manner that warranted discipline, such as insubordination and endangering his own safety and health and that of other employees, as is alleged here. Although it has been determined that safety was at issue in the present case, the question of whether or not the employee could rely on this "danger" to be found to have had "reasonable cause" to believe that a dangerous condition existed is a distinct one.

In the instant case, the employer is accused of having disciplined the complainant in violation of section 147(a). The evidence established that the employer truly believed that the complainant had refused to carry out his duties without reasonable cause to do so and that he had behaved in an insubordinate manner toward his supervisor. Thus, the employer asked the Board to dismiss the complaint on the ground that the complainant had not "bona fide" exercised his rights as in William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332), where the Board said:

*"An employee's right to refuse under section 82.1 must be used wisely and only in the true interests of safety. To abuse that right by coupling it to other interests such as to gain an advantage in collective bargaining will, in the long term, defeat the purpose and*

*attainment of the goals of Part IV of the Code. Improved safety and reduction of health hazards in the workplace through consultation and co-operation cannot be accomplished in an air of mistrust and adversity. Any employee refusal which coincides with other labour relations conflicts will receive very close scrutiny from the Board."*

(pages 189; and 248)

Taking everything into consideration, the Board found that the complainant, who was an experienced electrician, had been negligent in parking the cab in such an unsafe manner. Thus, there is no doubt that the complainant's refusal did coincide with other labour relations conflicts as was the case in William Gallivan, *supra*. Having so found, we could conclude that the complainant was not discharged because he was acting in compliance with the Code contrary to section 147, but because of behaviour the employer reasonably perceived as insubordinate.

In the present case, having regard to the oral evidence adduced, particularly to the testimonies of the complainant and his foreman, Mr. Shankar, we must conclude that even if Mr. Navratil's punishment might have been warranted in view of his negligent behaviour and his sincerity might have been questioned with respect to the circumstantial evidence adduced, Mr. Shankar's decision to fire him immediately without giving the complainant an opportunity to use safety devices, which in the past had proven to make access to work areas safe, or directing him to use such devices was nevertheless in violation of the Code. Under the circumstances, the employer could not show that there existed no genuine safety concern for the refusal. Had the employer been able to show to the Board that it had provided the employee with an opportunity to access the unsafe area in a "safe" manner through the use of a ladder or a harness, or directed him to do so, and had the employee refused, then there would have been reason to question the employee's allegation that his refusal was based on "genuine safety concerns." In the present case, however, the evidence revealed that the employee was given neither the time nor the opportunity to use devices that would have made the access safe.

Thus, although the Board has no difficulty believing Mr. Shankar's claims that he had fired the complainant for improper work procedures and unsafe work practice, the Board, having regard to the timing of the dismissal, cannot conclude that the complainant's belief that there was a danger in the circumstances was not genuine since the employer had not taken every reasonable precaution for the protection of the employee. Mr. Shankar had already made up his mind about Mr. Navratil. He believed that the complainant was recalcitrant and, as the events have shown, he was not prepared to give Mr. Navratil the benefit of the doubt because he was convinced of the complainant's bad faith. In view of what had transpired before, he was sure that Mr. Navratil had been deliberately negligent, had wilfully created the dangerous situation, or at the very least, was so angry at Mr. Shankar that he did not think about the consequences of his actions. Understandably, therefore, Mr. Shankar did not want the problem created by Mr. Navratil to become someone else's, nor did he want Mr. Navratil to get away with what he had done. However, the problem here is that Mr. Shankar was also angry at Mr. Navratil, and that he let his anger cloud his judgment to the point where he no longer wanted to have to deal with the complainant, a result he knew he might not have achieved had he directed the complainant to use the ladder or the safety harness instead of firing him.

Accordingly, the Board concludes that the burden of proof, which in these circumstances is on the employer, has not been met insofar as it has not been established to the Board's satisfaction that the disciplinary action was not imposed because the complainant had exercised his rights under Part II of the Code. Having so found, the Board therefore concludes that the employer has contravened section 147(a) of the Code by firing the complainant on July 28, 1995.

However, in view of the fact that it has been established to the Board's satisfaction that the disciplinary action was imposed in part because the complainant had acted in violation of Part II of the Code, the Board is not prepared to order, as the union requested, the complainant's reinstatement to his regular work-force electrician's position with full redress, or to order the removal of all letters relating to Mr.

Navratil's performance from his file. Insofar as the content of Mr. Navratil's disciplinary file is concerned, suffice it to say that Mr. Navratil's performance prior to the incident under consideration has nothing to do with the present complaint. As concerns the financial redress requested, in view of the circumstances of this case, the Board believes that it is not warranted. To a large extent, the complainant was the author of his own misfortune; it would therefore be unfair to let the employer bear all responsibility.

For all of the foregoing reasons, the complaint of violation of section 147(a) of the Code is allowed, and the employer is ordered to reinstate the complainant in his regular work-force electrician's position forthwith, but without financial redress, the whole pursuant to section 134(b) of the Code.



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Véronique L. Marleau  
Member



# information

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## Summary

Montréal Port Corporation, *applicant*,  
Syndicat des débardeurs, Local 375 of the  
Canadian Union of Public Employees,  
*respondent*, and Public Service Alliance of  
Canada, *interested party*.

Board File: 530-2535  
CCRT/CLRB Decision no. 1166  
June 17, 1996

## Résumé

Société du Port de Montréal, *requérante*,  
Syndicat des débardeurs, section locale 375 du  
Syndicat canadien de la fonction publique,  
*agent négociateur accrédité*, et Alliance de la  
fonction publique du Canada, *partie*  
*intéressée*.

Dossier du Conseil: 530-2535  
CCRT/CLRB Décision n° 1166  
le 17 juin 1996

Application for review of bargaining unit  
pursuant to section 18 of the Canada Labour  
Code, Part I.

The employer requests that the position of  
yard master be excluded from the railway  
staff bargaining unit and included in the  
technical and professional employees unit  
which covers rail operation supervisors. It  
contends that the yard masters perform  
supervisory functions and that their inclusion  
in the same bargaining unit as those they  
supervise places them in a situation of conflict  
of interest. The application is dismissed. A  
review of the functions of yard master shows  
that the true nature of this position relates  
more to dispatching than to supervising and  
that although the work of yard master  
involves a certain supervision, it is largely  
incident to the primary function of  
dispatching. Accordingly, the yard masters'  
true community of interests does not lie with  
the supervisors and the other technical and  
professional employees.

Demande de révision d'une unité de  
négociation présentée en vertu de l'article 18  
du Code canadien du travail, Partie I.

L'employeur demande que le poste de chef de  
cour de triage soit exclu de l'unité de  
négociation du personnel ferroviaire et inclus  
dans l'unité des employés techniques et  
professionnels qui couvre les superviseurs à  
l'exploitation ferroviaire. Il soutient que les  
chefs de cour de triage exercent des fonctions  
de supervision et que leur inclusion dans la  
même unité que les employés qu'ils  
supervisent les place en situation de conflit  
d'intérêts. La demande est rejetée. Un examen  
des fonctions de chef de cour de triage révèle  
que la véritable nature des attributions de ce  
poste relève bien davantage de la répartition  
que de la supervision. Certes, le travail de  
chef de cour de triage comprend un certain  
degré de surveillance, mais celle-ci est  
largement incidente à la fonction principale de  
répartition. Par conséquent, les chefs de cour  
de triage n'ont pas de véritable communauté  
d'intérêts avec les superviseurs et les autres  
employés techniques et professionnels.

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LES MOTIFS DE DÉCISION DU CCRT SONT  
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## Reasons for decision

Montreal Port Corporation,

*applicant,*

*and*

Syndicat des débardeurs, Local 375 of the  
Canadian Union of Public Employees,

*certified bargaining agent,*

*and*

Public Service Alliance of Canada,

*interested party.*

Board File: 530-2535

CCRT/CLRB Decision no. 1166

June 17, 1996

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Ms. Véronique L. Marleau et Mr. David Gourdeau, Members. A hearing was held at Montreal, on May 14 and 15, 1996.

### Appearances

Mr. Paul A. Venne, assisted by Mr. Jean-Pierre Gauthier, Labour Relations Manager, Port of Montreal, and Mr. Georges Gagné, Manager, Railway Operations, Port of Montreal, for the applicant;

Mr. Jacques Lamoureux, assisted by Mr. André Jacques, Labour Relations Advisor, and Mr. Alain Desrochers, Union Vice-President, for the respondent;

Mr. Alain Piché, Coordinator of Organizing, for the interested party.

These reasons for decision were written by Véronique L. Marleau, Member.

## I

The Board has before it an application for review made on January 12, 1996 by the Montreal Port Corporation (the Employer) under section 18 of the Canada Labour Code. The application seeks to exclude yard masters from the bargaining unit composed of railway personnel represented by the Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees (CUPE). The description of the bargaining unit reads as follows:

*"all employees of the Montreal Port Corporation working in the Port of Montreal assigned to the traffic department, railway network (marshalling yard), excluding office clerks, car checkers, rail operation supervisors, and those above."*

## II

The Employer, who acknowledges that the yard masters are employees within the meaning of the Code, is seeking their exclusion from the above-described bargaining unit on the ground that these employees perform supervisory duties and are therefore in a conflict of loyalties. The Employer alleges that the yard masters should in future belong to the bargaining unit represented by the Public Service Alliance of Canada (PSAC), which includes rail operation supervisors. According to the Employer, there is a community of interest between these employees and yard masters. On the other hand, the inclusion of the position of yard master in the bargaining unit of railway personnel seriously compromises the efficiency of port operations and labour relations.

The Board had already decided the question in a decision of March 1987 (file 555-2560). At the time, it had determined that the inclusion of the yard masters in the unit of railway personnel was appropriate. The Board's certificate was subsequently amended on May 7, 1992 (file 530-2061) and replaced on February 21, 1996 (file 555-3990), but these changes did not alter the status of the yard masters and their inclusion in the bargaining unit.

In this regard, the Employer argued that, at the time, there was no supervisors' unit. However, the yard masters directly supervised the yardmen, conductors and engineers. They worked three different shifts (day, evening, night) seven days a week. Their immediate superiors were the rail operation supervisors who, however, did not work the night shift or weekends. Consequently, this meant that the yard masters were the only Employer representatives on duty for approximately 90 hours a week, 52 weeks a year.

The Employer further argued that the yard masters felt unable or were unwilling to participate in applying regulations and disciplinary measures to the employees they supervised because they were in the same bargaining unit as these employees. Thus, since 1987, no disciplinary action had been taken by the yard masters or with their participation and they had not completed any incident report that could result in disciplinary action. Essentially, the Employer's complaint was that the yard masters were lax in performing the supervisory duties assigned them and it attributed this laxness primarily to the conflict of interest in which they were placed because of their inclusion in the bargaining unit composed of railway personnel.

The Employer relied on the Board decisions in CFTO-TV Limited (1981), 45 di 306 (CLRB no. 345); Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; et 80 CLLC 16,045 (CLRB no. 240); and Pacific Western Airlines Ltd. (1983), 52 di 56 (CLRB no. 416), which established the Board's policy of favouring, when it determines units appropriate for collective bargaining, the separation of supervisors and the employees they supervise. Relying on the Board decisions in Wardair Canada (1975) Ltd. (1983), 53 di 26; and 2 CLRBR (NS) 129 (CLRB no. 409); Voyageur Colonial Limited (1986), 64 di 167 (CLRB no. 563), pages 169-170,173; Atomic Energy of Canada Limited (1978), 33 di 415; and [1979] 1 Can LRBR 252 (CLRB no. 156), pages 427, 429; and 262-263, 265; and British Columbia Telephone Company (1977), 33 di 361; [1977] 2 Can LRBR 385; and 77 CLLC 16,107 (CLRB no. 98), pages 396-397; and 650, the Employer further argued that the yard masters'

supervisory function corresponded to the "supervision" described in these cases and concluded from this that the Board should find, as it did in these cases, that the yard masters should not therefore be included in the bargaining unit composed of the employees they supervise, but rather in the supervisors' unit.

CUPE, for its part, opposed the exclusion of the yard masters from the bargaining unit composed of railway personnel. It argued that the yard masters did not perform any supervisory functions and that the intended scope of the supervisors' bargaining unit in no way covered the position of yard master. CUPE refuted the Employer's allegations concerning the labour relations problems that would be created by the inclusion of the yard masters in the existing bargaining unit. It alleged that the supervisory duties were performed by the rail operation supervisors and not by the yard masters, as was apparent from the job description of the yard masters. Moreover, so long as the organization chart provided by the Employer must be taken as evidence of the Employer's perception of the yard masters' place in the chain of command, then it must be concluded that they in no way occupied a supervisory position, because according to the organization chart, this function was performed exclusively by the rail operation supervisor.

CUPE also argued that the facts on which the Employer relied in no way justified the Board's intervening, because there was no new evidence that would warrant transferring the position of yard master to another jurisdiction, namely, the bargaining unit represented by the mis-en-cause union, PSAC. On the contrary, to date, the history of labour relations in the Port of Montreal revealed that the bargaining unit in question had proven to be viable and functional and that the inclusion in 1972 of the yard masters with the other employees assigned to the traffic department of the railway network had ensured stable collective labour relations between the Montreal Port Corporation and the employees represented by CUPE, while permitting the negotiation of a number of collective agreements since that date.

As an interested party, PSAC also objected to the Employer's application for review which sought to include the yard masters in the bargaining unit it had been representing since March 25, 1988 (file 555-2499). The yard masters, argued PSAC, had no community of interest with the employees in this unit which, although it included the rail operation supervisors, remained a unit of technical and professional employees. PSAC pointed out that the members of this unit must have a postsecondary degree or diploma, which was not the case with the yard masters.

### III

Given the divergent views of the parties on the duties performed by the yard masters and the length of time they have been members of the bargaining unit in question, the Board deemed it appropriate to convene a public hearing of the parties to determine the real nature of the duties performed by these employees. Having heard the parties and examined all the documentation filed, the Board concludes, for the reasons stated below, that there is no reason to alter the existing situation.

The yard masters employed by the Montreal Port Corporation have been members of the bargaining unit of railway personnel since 1972. They work under the supervision of the rail operation supervisor. Generally speaking, their duties consist in assigning manoeuvres to train crews, organizing traffic on railway tracks, and receiving instructions from the railways on the manoeuvres they want to perform. To this end, the yard masters must designate the tracks that the trains are to use, establish radio contact with the locomotives, receive calls from CN and CP announcing the arrival of a train, and authorize access to inbound cars by determining the track on which they are to be parked or notifying them of the track on which outbound cars are parked. The duties of the yard masters therefore essentially involve dispatching. Clearly this work entails some supervision; this supervision, however, is largely incidental to the principal dispatching function.

The Employer argued that the yard masters could authorize overtime. In our opinion, this fact is not decisive in the instant case. The power to authorize the overtime at issue here is a power that is delegated in very specific cases and that must be exercised in accordance with the procedures specified in the directives that have been issued to the yard masters by the Employer. This then is a very well-defined power that leaves no room for discretion.

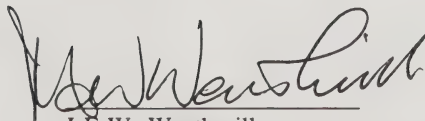
Moreover, in disciplinary matters, the yard masters' role is limited to informing their immediate superior of the incidents they may have witnessed. In this regard, the Employer argued that during the ten years preceding the filing of the present application, no disciplinary action had been taken with the assistance of a yard master, nor was there any record of a yard master's having completed an incident report during this period. The Employer complained in particular of the problems it has in managing its personnel effectively when it does not receive any incident reports from the yard masters. It attributed this problem to the inclusion of these employees in the unit composed of railway personnel. In the Board's opinion, the existence of this reporting problem tends to confirm, on the contrary, the absence of any identification of the yard masters with the supervisory role that the Employer wishes them to play. Further evidence of this is the Employer's admission that while a supervisor can impose a disciplinary measure on a yard master, the latter cannot in turn discipline train crew members. In these circumstances, it is not surprising that the yard masters claim to have less in common with the rail operation supervisors than they do with the train crew members whom they may sometimes replace, under the exchange of position provisions of the collective agreement. Clearly the yard masters have a greater community of interest with the railway personnel than with the supervisors.

The evidence also reveals that the Employer refused to act on the recommendations of the position assessment plan prepared by a joint committee composed of an equal number of representatives of the Port of Montreal (the Employer) and PSAC (the union) in February 1985, "in order to assess the relative value of the work performed in the Port of Montreal". This plan recommended that the title of the position of yard

master be changed to "railway operation supervisor", a change that would have required the upward reclassification of the position of yard master. In the Board's opinion, this fact confirms that the Employer itself has difficulty conceiving of the yard masters being on a par with the rail operation supervisors.

In short, the supervisory duties performed by the yard masters are very limited. As we stated earlier, their work essentially involves dispatching, and while it is true that they perform certain supervisory duties, these duties are insufficient to make these employees bona fide supervisors. We therefore conclude that the yard masters have no real community of interest with the supervisors and the other technical and professional employees.

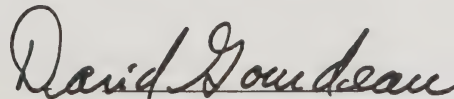
For these reasons, the Board decides that the yard masters must remain in the bargaining unit composed of railway personnel. The review application is therefore dismissed.



J.F.W. Weatherill  
Chairman



Véronique L. Marleau  
Member



David Gourdeau  
Member



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## Summary

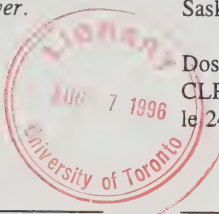
Grain Services Union, *complainant*, and Saskatchewan Wheat Pool, *employer*.

Board File: 745-5099  
CLRB/CCRT Decision no. 1167  
June 24, 1996

## Résumé

Syndicat des services du grain, *plaignant*, et Saskatchewan Wheat Pool, *employeur*.

Dossier du Conseil: 745-5099  
CLRB/CCRT Décision n° 1167  
le 24 juin 1996



The Grain Services Union alleges that Saskatchewan Wheat Pool (SWP) breached section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations) when it communicated directly to the employees details of its proposed salary grading plan after the union had presented the plan to the membership, and after the majority had voted against it.

The Board determines that, by communicating directly with its employees at the time and in the manner it did, on matters that had been the subject of intensive negotiations between itself and the employees' certified bargaining agent, the employer interfered with the union's representation of its members, in violation of section 94(1)(a). It is the Board's view that the employer's interference had the effect of undermining the union's role as certified bargaining agent. The Board therefore allows the complaint, and orders SWP to cease and desist from interfering in the union's representation rights, and to post copies of its decision at all of its premises where employees have access.

Le Syndicat des services du grain allègue que Saskatchewan Wheat Pool (SWP) a enfreint l'alinéa 94(1)a) du Code canadien du travail (Partie I - Relations du travail) en communiquant directement aux employés les détails relatifs au régime proposé de classification salariale et ce, après que le syndicat eut présenté ce plan aux membres et que la majorité l'eut rejeté par voie de scrutin.

Le Conseil détermine qu'en communiquant directement avec ses employés au moment et de la manière choisis, au sujet de questions qui avaient fait l'objet d'intenses négociations entre lui-même et l'agent négociateur accrédité, l'employeur est intervenu dans la représentation du syndicat auprès de ses membres, en violation de l'alinéa 94(1)a). Le Conseil est d'avis que l'intervention de l'employeur a eu pour effet de miner le rôle du syndicat à titre d'agent négociateur accrédité. Le Conseil accueille donc la plainte et ordonne à la SWP de cesser d'intervenir dans les droits de représentation du syndicat et d'afficher des copies de sa décision à tous les endroits où les employés ont accès.

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## Reasons for decision

Grain Services Union,

*complainant,*

*and*

Saskatchewan Wheat Pool,

*respondent.*

Board File: 745-5099

CLRB/CCRT Decision no. 1167

June 24, 1996

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The Board was composed of Mr. J. Philippe Morneault, Vice-Chair, and Mr. François Bastien and Ms. Roza Aronovitch, Members. A hearing was held on December 19, 20 and 21, 1995 in Regina, Saskatchewan.

### Appearances

Mr. Hugh J. Wagner, Secretary - Manager, also present Mr. Larry W. Hubich, Senior Administrative Representative, Grain Services Union, for the complainant; Mr. Dennis P. Ball, Q.C., MacPherson, Leslie, Tyerman Barristers and Solicitors for the respondent; also present, Mr. Jacques Pelletier, Manager, Employee Relations Human Resources Division, and Mr. A.W. Shalansky, Industrial Relations Manager, Human Resources Division, Saskatchewan Wheat Pool.

These reasons for decision were written by Mr. François Bastien, Board Member.

### I

This decision deals with an unfair labour practice complaint filed with the Board on June 5, 1995 by the Grain Services Union. It alleges that Saskatchewan Wheat Pool (SWP) violated section 94(1)(a) of the Canada Labour Code. Tied initially to this complaint was another allegation contending that the employer had bargained in bad

faith in violation of section 50 of the Code. In its submission to the Board of September 1, 1995, the complainant withdrew this portion of the complaint.

## II

The Grain Services Union (the Union or GSU) is the certified bargaining agent for the employees of the Saskatchewan Wheat Pool's Country Services Division (CSD) who are engaged in the operation of country elevators, farm service centres, seed cleaning plants, and activities related thereto. It also holds certification rights for the employees of the remaining four bargaining units at SWP. Following the expiry in January 1994 of the collective agreement covering these employees, the parties entered into negotiations but failed to reach an agreement. On September 1994, the employees went on strike. The evidence is that this was a bitter strike that ended on September 18, 1994 with the parties reaching a tentative agreement and entering into a Memorandum of Settlement. The terms of this settlement provided for the parties to enter into negotiations for the purpose of devising and implementing a new compensation and salary plan.

This development notwithstanding, parties to the agreement continued to experience a rather difficult industrial relations climate in the period leading up to the special bargaining process of the pay grading plan. The following incidents give an indication of the backdrop against which subsequent developments relating to the instant case can be judged. On October 28, 1994, the employer sent a letter to all employees regarding the union's request to increase dues by 2%. Attached to it was a letter from a lawyer representing certain SWP employees who were contesting the union's action. SWP stated in its letter that, since the union's request was in dispute it would continue to deduct union dues at the 2% rate the way it did when it was first notified by the union, but would send to the union only half of the amount deducted. No copy was forwarded to the union.

This lack of proper notification led to the filing by the union of a complaint of unfair labour practice before this Board. During the course of the investigation of the complaint by the Board's officer, the matter was settled. On March 20, 1995, the employer posted a notice to employees in which it recognized both the union's right to represent its members, and that internal union matters are for the union and its members to resolve. It also undertook to provide the union with copy of any correspondence pertaining to the negotiations of terms and conditions of employment.

The holding by the employer of half the increase in union dues, on the other hand, became the subject of two unfair labour practice complaints: one, before the Saskatchewan Labour Relations Board ; the other, before this Board (see Board's file no.: 745-4942). This latter complaint was subsequently withdrawn. Further, the group of employees who disputed the legitimacy of the union's decision to increase dues had commenced an action in the Court of Queen's Bench for Saskatchewan, and had filed its own application against the union before the Saskatchewan Board. SWP did not take an active part in the proceedings before the Saskatchewan Board but took the position that the money belonged to either the claimants, the union or the employees, and constituted an issue between them to be resolved by adjudication.

The matter of the existing pay plan was one of fundamental importance to the parties. It had been identified as an issue by the Major Issues Task Force in March 1994 in its survey of the employer's workplace and business environment, a survey conducted to identify structural trends and changes within the industry. Proposed changes to the grading plan, at least in terms of its underlying principles and overall thrust, were discussed during the negotiations that started in the spring of 1994. However, the real impetus toward the negotiation of the new compensation plan came with the conclusion of the strike-ending Memorandum of Settlement of September 1994. Indeed, as the matter of a new grading plan remained unresolved at the end of the negotiations, the Memorandum of Settlement provided for a separate process to deal with the proposed compensation plan and to hopefully conclude an agreement before

February 1st, 1995. Negotiations to renew the collective agreement were scheduled to begin in March 1996.

As per the terms of the Memorandum of Settlement, a negotiating or bargaining subcommittee was struck to deal with this issue. The five-person negotiating team on the union side was led by Mr. Larry Hubich who had acted as the union's spokesperson during the last round of negotiations with SWP. He was assisted by three (3) elevator managers and one (1) clerk from the farm service center side of the business. The employer's team was led by Mr. Frank Burdzy who had not been involved in the last negotiation.

SWP's Industrial Relations Manager, Mr. Allan Shalansky, who had been the company's chief spokesperson during the negotiations of all five (5) collective agreements, and whose role in this special bargaining round was limited to "kicking things off," explained that the selection of Mr. Burdzy as management team leader was meant as a clear signal to the union that it wanted to set those talks on a more cooperative footing.

Prior to dealing with the negotiation and without getting into the details of the salary grading plan itself, some information on its underlying principles and basic design is necessary for a proper understanding of the issue before the Board in the instant case. Among the findings of the Task Force just referred to was the fact that the employees felt the existing plan stifled teamwork and discouraged cooperation among neighbouring stations. The objective of the new salary grading plan was therefore to shift business emphasis from competition to cooperation and to redesign it around two key principles.

The first one concerned the expansion of the business units from single locations to market centers allowing for the delivery of a broader range of services and options to a larger customer base. This meant, organizationally, the redesign of roles, responsibilities and positions around a team-based, customer-focused concept. The

second principle was that of a necessary pay link between business performance and results. For instance it was recognized on all sides that the pay system as designed acted as a pay-boosting incentive for elevator managers to divert customers from one location to another. Consequently, under the new plan an employee's salary would be a function of both a "base" and a "business results" components with the latter component's portion to be based on the contribution of a marketing center team over past three crop years on a weighted centre, area, territory and province basis. The margin contribution of the market center team would be calculated in terms of "margin points" or, as they were often referred to during the hearing, "points per employee."

In addition, the plan was to be of broad application extending to the following occupational groups: warehouse workers, clerks, marketing representatives, administrative assistants as well as the newly set-up group of market center managers. Old job descriptions were to be renamed and reclassified. For instance, elevator managers, assistant elevator managers, warehouse workers and clerks, and area marketing representatives would become Managers, Customer Service, Assistant Managers, Customer Service, Customer Service Representatives and Area Marketing Representatives respectively.

The subcommittee commenced work in early November 1994. Communications to employees from the employer turned out to be among the first issues dealt with during this initial session. From the outset the union, through its spokesperson, Mr. Larry Hubich, expressed concerns over a recent company's initiative to communicate directly with employees represented by the union. At the end of October, the company had commissioned an employee attitude survey, and a focus group exercise, without any union's involvement. The union's Secretary-Manager Hugh Wagner, in his letter of November 2, 1994, to SWP's Director of Human Resource Division Michael Roberts, objected to this initiative on the basis that dealings with employees on matters of employment interest fell within the exclusive jurisdiction of the union. No

unfair labour practice complaint or grievance was filed by the union on that occasion. As well, the union made it clear at that same meeting that, while the negotiations were going on, it did not want any information on their progress to be leaked to its members from SWP's supervisors. Management's position was that it needed to keep its managers informed although it did refrain, in fact, from any direct communications to the employees before the talks broke off in early February. Finally, the possibility of having a joint union-management presentation made of the proposal was touched on by company representatives during this meeting. The union did not reject the proposal outright but suggested instead that it might consider it at a later stage depending on the progress of the negotiations.

On the plan itself, union representatives expressed very early on the reservations and concerns they had over a number of issues raised by its proposed design. For instance, they viewed with grave suspicion the concept of "points per employee" which, they feared, would become an incentive to eliminate jobs. Similarly, they had concerns over the number of jobs that would be "red circled," i.e. for which the pay rate would remain frozen as a result of being over the one set according to the new plan. These concerns remained throughout the course of the negotiations.

The subcommittee's members met many times in the weeks following this first meeting in November. In addition to the 8 to 10 days of joint meetings on the plan, intensive work went on between meetings within each team. By all accounts, the atmosphere of those meetings was quite cordial compared to the tense climate the union had experienced throughout the last negotiation. From an initial presentation of the model on spreadsheets and discussion of key concepts, negotiations moved to the specific impact the plan would have on individual pay level and conditions and how downward differentials would be dealt with. As a result, substantial number-crunching went on, numerous spreadsheets were prepared that detail the impact the proposed pay plan would have on individual compensation levels and, eventually, a number of modifications were made to the initial model, most of them in response to the union's concerns expressed earlier. But, as it turned out, some issues simply proved

intractable. Bargaining within the subcommittee group ended on February 7, 1995 with the parties at an impasse.

On that day, the company tabled what it termed its best offer on the new grading plan, the terms of which were later tinkered with as the discussion progressed but not to the point of altering the fundamentals of the package as initially offered. The union undertook on its part to take that offer first to its Executive Board, and then to its membership. Aware that the idea of a joint presentation was now off, management representatives asked the union to distribute copies of information sheets and handouts of the plan it had prepared to members during the ratification process. After reacting negatively, the union suggested that a copy be left with it to take to its Executive Committee.

On February 10 and 11, 1995, the Executive Board of the union reviewed SWP's best offer and decided to submit it to the members of the bargaining unit, together with the Report of the GSU CSD Salary Plan Bargaining Committee. Attached to this report was the following recommendation:

*"That bargaining to develop a new CSD salary plan continue to as to fully examine all the factors, tradeoffs and required changes in design, and if the Company does not agree to continue the bargaining, the process shall cease to be resumed during 1996/97 agreement renewal bargaining, if the members so direct at that time."*

Union membership meetings were held on February 13, 14 and 15, 1995. In addition to the information material just referred to, members were also provided with a copy of a point-by-point explanation of the proposed salary plan prepared by the union. Management was not advised, nor was it aware, that such a document had been so provided; it learned of its existence and use during the hearing. In any event, a 95 % majority of those voting approved by secret ballot vote the recommended course of action. This result was communicated to management on February 16, 1995.

According to SWP's Manager, Employee Relations, J. Pelletier, it was some time after this notification that SWP decided to communicate its salary plan directly to the employees. A meeting was held on April 13, 1995 during which SWP advised the union that bargaining on the new plan would not continue. A week later, GSU's General Secretary Hugh Wagner wrote to Mr. Pelletier to warn against a company's initiative to promote the proposed salary plan to union members through the participation and involvement of CSD's Market Development Managers. The terms of the warning were as follows:

*"...I must caution against any effort to enlist support of employees for the Company's bargaining position. Anything that goes beyond a very limited response to questions of a technical nature will run the risk of being construed as interference in the Union's exclusive bargaining jurisdiction.*

*My concern about this subject is heightened by virtue of Management's decision to reject the Union's proposal to continue the bargaining process. As you know, in arriving at its decision the GSU Local 1000 Executive Board reviewed the Company's proposed new salary plan with affected employees, distributed copies of the Company's proposal and conducted a secret ballot vote. While I think management reaction was unfortunate, the matter is closed. Any effort to revive the process by other means or to influence the workings of the bargaining agent in anticipation of the next round of agreement renewal bargaining would be extremely unfortunate and potentially destructive."*

The communication initiative referred to consisted of employee meetings where managers, with the use of promotional material, such as speakers notes and articles from company's newsletters, would provide information on the plan's design and impact. Involved in this project were SWP's Communication Division, staff from GSD and from the Employee Relations Division. Consequent upon Mr. Wagner's letter of April 20, 1995, Mr. Pelletier sent him all the promotional material to be used by Market Development Managers, and invited him to discuss the matter. As it turned out, they did discuss the matter, with other management and union representatives at a meeting held in Saskatoon on April 26, 1995. On that occasion, Mr. Wagner

provided comments on, and expressed reservations over, particular aspects of a couple of articles on the salary grading plan prepared by the company. One document entitled CSD Transition, in which SWP explained why it was communicating with employees now, was objected to by Mr. Wagner. He felt it put the union in bad light. But the thrust of the union's opposition had to do with the Company's position that, while prepared to give the union first opportunity to communicate details of the plan to its members, it would do so itself should the union refuse. According to Mr. Pelletier, Mr. Wagner threatened to "take appropriate action" against SWP if it chose to communicate to employees information previously presented to the union during negotiations.

The meeting ended with parties restating their respective positions on the new pay plan. For instance, Mr. Wagner reiterated concerns over the nature of the material which he considered a "sales pitch" and the fact that supervisory personnel would be talking directly to employees about it. For its part, the company felt it had the right to communicate to employees directly as the negotiations had ended for some time and it did not share the legal interpretation of the union as to the meaning of the Code restrictions regarding the right of management to communicate with its employees.

In the week that followed, the company's communication material on the salary plan was reviewed and edited in light of the union's comments. The material was faxed to the union on May 4, 1995 prior to it being communicated to GSU employees. In its letter of May 11, 1995 to Mr. Pelletier, the union formally objected to the company's communication to its members, an initiative it likened to actually engaging in bargaining with employees. On May 15, 1995, the company replied that it intended solely to inform employees, not to overlook the union's role as the exclusive bargaining agent for that group of employees. The same day, SWP reiterated the same message to its Market Development Managers.

### III

#### PARTIES' ARGUMENTS

The union submits that the employer engaged in direct communication with its employees in the context of collective bargaining. The issue of a new pay plan was discussed during the negotiations but was left unresolved. It then became the subject of a special bargaining process through the working of a subcommittee. Throughout this period the employer's attitude toward the union remained confrontational as the bitter strike and the post-strike actions, notably with regard to the raise of union fees, clearly indicate. As well, the conduct of an employee survey on collective bargaining matters, without prior involvement of the union, sent a strong signal that the employer was second guessing the bargaining representatives on employees views and interests.

The employer chose to communicate directly to the employees details of its pay plan offer because it was displeased with the union's control over the information on the plan and with the union executive-recommended rejection of the offer by the members. The union's view is that management was very much aware of its concerns about the plan but refused, in the end, to alter it fundamentally to accommodate these concerns. By choosing instead the direct communication course it did, the employer was actually bargaining over the head, or around, the bargaining agent in matters of vital concern to the membership. The information it provided on the plan had all the ingredients of a sales pitch to the employees in anticipation of the next round of bargaining due to take place in March 1996.

As for its position on the need to control the distribution of information pertaining to the progress of the negotiations and, more specifically, the content of the employer's best offer, the union contends that it is based on its very role as an exclusive bargaining agent. This control is meant to ensure that information pertaining to negotiations does not come out in "dribs and drabs," and that the employer does not use to bargaining advantage the superior means it has to reach employees through its

multiple channels of communications with them. Finally, without having a legal requirement to do so, the union undertook to take SWP's best offer to its membership who overwhelmingly rejected it while supporting the idea of continuing the negotiations. They argue that, in the absence of a willingness on the part of the employer to resume bargaining, its communication action was an attempt to influence the bargaining outcome on the salary grading plan.

SWP's argument is essentially two-fold. The first relates to the context of its communications with its employees; the second, to the content of the information so communicated. On the first point, counsel for the employer argues that the communication at issue took place after some 14 months of negotiations of the salary plan and only after it became clear that those negotiations were over. It is only at this stage that the employer felt compelled to put its terms on the table for the employees to see. Up to that point, and notwithstanding the fact that it did not share the union's legal interpretation of the restrictions section 94(1)(a) puts on an employer's ability to communicate directly with its employees, SWP had refrained from engaging in such direct communication while collective bargaining was on or during discussions of the Subcommittee on the Salary Grading Plan. The fact that it did indicates that the employer was mindful of, and showed consideration for, the union's exclusive role to represent CSD employees.

On the second point, it is the employer's contention that the information ultimately communicated to employees was truthful, fair and respectful of the union's role. Indeed, the employer took great care to ensure that the information was accurate. To wit the many comments it elicited, and in some cases got from the unions on the various material prepared for the Market Development Managers. In addition, the communication specifically recognized the role of the union as the employees' exclusive bargaining agent, and encouraged employees to consult with the union if they had questions. By communicating with employees the way it did, the employer stayed within the bounds of permissible communications under the Code. According to counsel, when a trade union has had every opportunity to discuss an issue with the

employer and to inform its members on these discussions, has been consulted with respect to the accuracy of the employer's communications, and is given every reasonable opportunity to respond to such communications, imparting factual information to employees does not constitute an interference with the union's representation rights.

#### IV

Section 94(1)(a) states that:

*"94. (1) No employer or person acting on behalf of an employer shall*

*a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."*

(emphasis added)

In the instant case, the issue is whether, by communicating directly with its employees at the time and in the manner it did, and on matters that had been the subject of intensive negotiations between itself and the employees' certified bargaining agent, SWP interfered with the union's representation of its member employees. In order to determine this issue, the Board must first delineate the nature and scope of the prohibition envisioned by section 94.

This Board had many occasions recently to comment on the significance and extent of this prohibition as it relates to direct communications from the employer to the employees represented by a union. See: Aéroports de Montréal (1995), 97 di 116 (CLRB no. 1115); Canadian Broadcasting Corporation (1994), 96 di 122; 27 CLRBR (2d) 110; and 95 CLLC 220-028 (CLRB no. 1102); Canadian National Railway Company Limited and AMF Technotransport Inc. (1994), 94 di 11 (CLRB no. 1058). Similarly, provincial boards have issued words of caution with regard to communication matters between the employer and its unionized employees. See:

Irving Oil Limited, August 4, 1995 (NBLRB) and Canada Safeway Limited et al., [1995] 3rd Quarter Sask. Labour Rep. 170.

What all of these decisions point to is, first, that this section does not mean that the employer should not engage, under any circumstances, in approaching employees directly on matters of employment interest. As indicated in Canadian Broadcasting Corporation, supra, workplace realities and trends being what they are, namely with respect to employee involvement and empowerment, greater consultation and interaction between management and labour on work-place issues is desirable and proper. Section 94(1)(a) is not meant to restrict this type of communications. But there is a requirement that, when instituting such a consultative or communication process, the employer ensure that "its implementation does not serve to subvert, circumvent or replace the union in its legitimate role as exclusive bargaining agent" (Canadian Broadcasting Corporation, supra, pages 134; 122; and 143,273).

However, what these decisions make clear as well is that the labour relations context within which such communications take place, the content of the communications themselves, and the consequences, intended or not, that they have on the authority of the bargaining agent are all critical factors in determining whether an employer has crossed the thin dividing line between what is proper direct communication under the Code and what is not. The communication process in a unionized work environment is a dynamic one which has, through its various permutations and forms, the potential to influence not only the employer-employee rapport but that of the employee-bargaining agent as well.

The limitations put on the communication process by section 94(1)(a) are to be understood within the context that a certified bargaining agent remains vested with the exclusive authority to fully represent the interests of its members and carry out all of its obligations under the Code. It relates ultimately to the centrality of the institution of collective bargaining within the broad scheme of the Code, and the attendant need

to maintain the integrity of the collective bargaining process by protecting the parties to it.

In the present case, the Board must address the nature of the communication process the employer engaged itself in, as well as the specific labour relations context within which this process took place. SWP through its Market Development Managers did communicate details of its proposed salary grading plan to its employees after the special negotiations of the plan broke off in mid-February. The content of the communication related therefore to the very employment matters that were the subject of the negotiations.

On that specific point, counsel for the employer made much of the fact that SWP consulted and got input from the union on the informational material on the plan it was about to distribute to its Market Development Managers in May 1995, and that it did so only after negotiations had reached an impasse. He saw it as an indication that the employer was not attempting to bypass or undermine the union but, instead, to provide employees with accurate information on a matter of importance to them. Aside from the fact that SWP was repeatedly warned by the union not to communicate with its members on the matter of the pay plan, there is nothing in the evidence to suggest that the employer was not aware of how risky, from the perspective of the Code, the communication road it chose to embark upon was. This was particularly so in that the object of that communication was the very matter the negotiation failed to resolve.

The fact that the subject matter communicated was the same as the one that had been previously, if unsuccessfully, negotiated makes the instant case different from those cited above where some questions remained as to whether the matter at issue was either a collective bargaining one, or one that fell within the purview of the existing collective agreement. In other words, the matter at issue here not only relates to collective bargaining but is the same that remained at the core of the special negotiation process set up to resolve it.

In those circumstances, it is difficult to imagine that SWP's communication exercise, no matter how carefully circumscribed or its informational content accurately presented, would not impact adversely on the bargaining agent. In this regard, the Board notes that the employer did solicit, and got some union's input on the content of the information it distributed to employees. However, the mere fact that it took place in the period immediately following the Union Executive's negative recommendation and that it centered around the same offer that had been rejected by the membership, would have the effect, by implication, to call into question the role of the bargaining agent in its handling of the issue. On that point, it should be noted that the union, as it is entitled to, did put before its members an analysis of the text of SWP's best offer. It was the union's judgement that the proposed salary grading plan, even after having been altered to accommodate some of its concerns, still fell short of what it considered to be the interests of the employees it represents, and it suggested that they vote accordingly. That, they did. The employer's subsequent action to communicate detailed information of the plan to the same employees through its hierarchical channels, however well-intentioned, had the effect of undermining the role of the certified bargaining agent. In the Board's view, this conduct is contrary to the Code.

The proximity of the next round of negotiations scheduled to take place in the spring of this year is another factor that adds weight to this finding of the employer's violation of section 94(1)(a) of the Code. As indicated above, the effect of this section is to grant a bargaining agent a form, so to speak, of institutional protection with regard to the fulfilling of all its obligations under the Code, notably that of negotiating a new collective agreement for its members. It is no secret that the upcoming round of negotiations between SWP and GSU will deal, of necessity, with the issue of the salary grading plan. Any direct communication from the employer to the employees on a matter of such concern to both of them has the potential, if not the actual effect, of tilting the bargaining balance in favor of the employer. This is something clearly contrary to the scheme of the Code relative to the collective bargaining process. One of the reasons for the restrictions put by the Code on this form of communication is

that of maintaining a pre-bargaining balance between the parties so that the employer cannot use its greater ease of access to employees to gain a competitive advantage at the bargaining table. Again, regardless of whether such was the employer's intention, the fact that it did take place in these circumstances supports the Board's finding that such a conduct is contrary to the Code provision here at issue.

Having said that, the Board is mindful of the difficulties faced by both parties in the negotiations of a new pay plan and the particular communication needs that flow from such a fundamental change. Indeed, there is no disputing the fact that the sheer complexity of the plan, be it from a design or an implementation viewpoint, weighed heavily on the difficulties the parties had to come to an understanding as to what it should be, and how it would likely affect the critical compensation interests of the union membership. Negotiations of a package of such importance would have been difficult in the best of circumstances; but coming as it did in the wake of a bitter strike, it faced some daunting difficulties. These are, to be sure, mitigating circumstances but not to the point of lessening the need on the part of the employer to refrain from any conduct that may have the potential to erode the status of the bargaining agent and its credibility vis-a-vis the membership. Warning calls were repeatedly issued during and after the special negotiation by the union to the employer on the danger of running afoul of the Code direct communication prescriptions. These calls went unheeded.

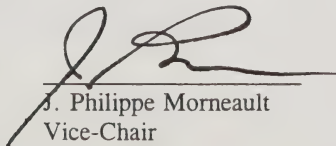
For all these reasons, the Board concludes that SWP did violate section 94(1)(a) of the Code when it communicated directly to the employees details of its proposed salary grading plan.

## V

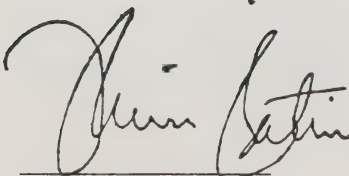
Pursuant to its powers conferred by section 99 of the Code, the Board:

- (1) declares that the employer, by communicating directly with its Country Services Division's employees on matters of important employment and collective interest interfered with the representation rights of the certified bargaining agent vis-à-vis these employees in violation of section 94(1)(a) of the Canada Labour Code;
- (2) orders the employer to cease and desist from interfering in the union's representation rights by communicating to these employees information relating to its proposed salary grading plan; and
- (3) orders the employer to post copies of this decision at all of its premises where employees have access, no later than five (5) days following its receipt thereof, and to keep it posted for a period of at least 20 days.

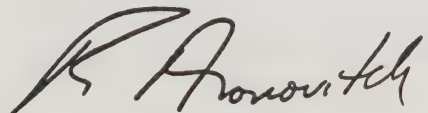
The Board issues no order with regard to the payment of costs and damages to the union. The punitive character of such an order would likely prove detrimental, in the Board's judgement, to a prompt and useful resumption of discussions between the parties of a new pay plan, particularly in light of the upcoming round of negotiations. After all, this is the communication process that section 94(1)(a) is meant, inter alia, to protect and, with it, the vitality of collective bargaining as envisioned under the Canada Labour Code.



J. Philippe Morneau  
Vice-Chair



François Bastien  
Member



Roza Aronovitch  
Member



# information

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## Résumé

Serge Carrière, *plaignant*, et Syndicat des  
postiers du Canada, *intimé*, et Société des  
postes, *employeur*.

Dossier du Conseil: 745-4992  
CCRT/CLRB Décision n° 1168  
le 25 juin 1996

## Summary

Serge Carrière, *complainant*, Canadian Union  
of Postal Workers, *respondent*, Canada Post  
Corporation, *employer*.

Board File: 745-4992  
CCRT/CLRB Decision no. 1168  
June 25, 1996

Le plaignant allègue que le syndicat a refusé arbitrairement de porter ses deux griefs à l'arbitrage et a ainsi enfreint l'article 37 du Code. Le premier grief reprochait à l'employeur de ne pas avoir affiché des postes vacants et de les avoir ainsi comblés sans que le plaignant n'ait pu postuler et faire valoir son ancienneté. Après enquête, il s'est avéré qu'il ne s'agissait pas de postes vacants mais plutôt de postes excédentaires comblés de façon temporaire par des employés affectés à des travaux légers et ce, aux termes d'une entente intervenue entre l'employeur et le syndicat. L'allégation de favoritisme n'était soutenue d'aucune preuve. Devant ces faits nouveaux, le grief a été réévalué et retiré parce que voué à l'échec.

Le second grief a été retiré parce que déposé hors délai. Le Conseil juge que le syndicat a rempli son devoir de représentation juste et confirme sa politique invariablement appliquée en cette matière depuis de nombreuses années. Les plaintes sont donc rejetées à l'unanimité.

The complainant alleges that the union arbitrarily refused to refer his two grievances to arbitration, and thus violated section 37 of the Code. The first grievance was contesting the fact that the employer had not posted two vacant positions and had filled them without allowing the complainant to apply and take advantage of his seniority. After investigation, it became clear that the positions were not vacant but had been declared surplus and were temporarily filled by employees assigned to light work as per an agreement entered into by the employer and the union. The allegation of favoritism was not supported by any evidence. In view of these new facts, the grievance was re-evaluated and withdrawn since it was doomed to failure.

The second grievance was withdrawn because it was untimely. The Board determines that the union has discharged its duty of fair representation and confirms the long-standing principles it has always applied in these matters. The complaints are therefore unanimously dismissed.



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LES MOTIFS DE DÉCISION DU CCRT SONT  
MAINTENANT ACCESSIBLES DANS QUICKLAW.

## Reasons for Decision

Serge Carrière,

*complainant,*

*and*

Canadian Union of Postal Workers,

*respondent,*

*and*

Canada Post Corporation,

*employer.*

Board File: 745-4992  
CCRT/CLRB Decision n° 1168  
June 25, 1996

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The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chairman, and Mr. François Bastien and Ms. Véronique L. Marleau, Members. A hearing was held at Montréal on September 27, 1995.

### Appearances

Mr. Serge Carrière, on his own behalf;

Mr. Paul Lesage, assisted by Mr. Raymond Cimon, for the respondent; and

Mr. Marc Santerre, for the employer.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chairman.

This complaint alleges that the Canadian Union of Postal Workers (CUPW) breached its duty of fair representation. Serge Carrière claims that his union acted in a

discriminatory manner and in bad faith by refusing to refer his grievances to arbitration.

Section 37 of the Code describes the duty of fair representation as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

## II

At the hearing, the complainant and his two witnesses, Messrs. Charron and Langlois, were examined and cross-examined by counsel for the union and for the employer. CUPW did not call any witnesses and the employer soberly explained its non-intervention policy at this stage of the proceedings.

The parties' evidence and arguments can be summarized as follows.

The complainant has worked for the Canada Post Corporation (CPC) for 18 years. Initially, he operated semi-trailer trucks (PO-EXT-1) and heavy-duty trucks (PO-EXT-3); recently, he began performing postal clerk duties (PO-4) at various postal stations in the Montréal region.

Between February 1993 and January 1994, he delivered small parcels out of the Ville-Émard postal station (PO-EXT-1). Following an absence because of illness, he returned to work in a temporary position at the St-Laurent postal station and was assigned light work on the night shift.

During this assignment, he learned (on January 10, 1994) that three routes (PO-EXT-1) had been staffed without being posted, as required by articles 51 and 52, or offered in accordance with clause 22(13) of the collective agreement.

According to the complainant, these positions were vacant, and by not posting them, the employer had not followed the procedure provided for in the collective agreement. The complainant filed a first grievance on February 9, 1994, alleging that the employer had filled the vacancies while disregarding the notion of seniority as defined in the collective agreement. The positions were apparently given to employees assigned to light work, as Mr. Carrière himself was at the time, in the same way as the persons who were given the positions at issue in the complainant's grievance. This grievance followed the normal procedure and was referred to arbitration, and the hearing of the case was scheduled for September 26, 1994.

However, the union withdrew this grievance before the arbitration hearing. The complainant was notified of this decision in a letter dated October 6, 1994. According to the complainant, favouritism was the reason for the withdrawal of his grievance: his union had withdrawn the grievance because one of the positions had been given to his union steward. Because the positions were not advertised, friends of the union officers allegedly circumvented the seniority requirement that favoured the complainant by preventing him from applying. Specifically, the complainant alleged that Mr. Alain Thomas, a union steward, had used this stratagem to obtain one of the coveted positions. The documents on file indicate that the three routes in question were not posted, which the union does not deny.

For its part, the union admitted that the employer had not posted the positions, but claimed that, by raising the matter with employer representatives, it had investigated the allegations made by the complainant in his grievance and then concluded that the positions had been filled temporarily. The union argued that, in these circumstances, it could not pursue the complainant's grievance because the positions were not considered vacant within the meaning of the collective agreement. In June 1994, the

union and the employer entered into concluded an agreement to deal with this situation. Not until then were all the vacant positions filled over a period of several weeks in accordance with the provisions of the collective agreement.

The union explained that its decision to abandon the complainant's first grievance was based on the following considerations: (1) because of the discussions that had been going on since the summer of 1993 with the employer concerning the surplus positions, in the context of article 53 of the collective agreement, it had no basis for claiming that the positions had been filled permanently; and (2) clause 13.22 of the collective agreement dealt with the staffing of vacant positions and, in the instant case, there were no vacancies at the time because the positions were not filled permanently until the union and the employer concluded the agreement to this effect in June 1994. The union therefore re-examined the grievance in light of this agreement. Since surplus positions were given priority over those declared vacant, there was therefore no basis for the complainant's grievance and it was doomed to failure. In fact, the complainant had always considered that the positions he coveted were vacant.

The second grievance filed on June 1, 1994 resulted from a request from the complainant for a transfer to the PO-EXT-3 position. This type of request must be received at least ten working days before the position is filled. According to the complainant's interpretation of the collective agreement, the employer should have filled this position, not through a transfer, but on the basis of seniority, and the position would have been his by right. However, the complainant admitted that his request for transfer was untimely: he was four days late in making it and did not therefore meet the requirements of the collective agreement. This was why the union had withdrawn his grievance from arbitration.

#### IV

In section 37 complaints, the Board's role is limited to examining the manner in which the union represents the members of the bargaining unit with respect to their rights under the collective agreement. The right of employees to have their grievance referred to arbitration is not absolute and the Board recognizes that unions have considerable discretion in making a decision in this regard, even where employees insist that their grievance be referred to arbitration. The Board's policy in this regard was clearly set out in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted:*

- 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
- 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
- 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
- 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
- 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

V

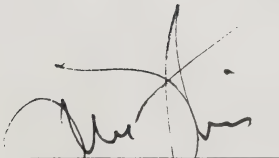

The Board examined the allegations of favouritism which, according to the complainant, are at the root of the union's decision not to refer the first grievance to arbitration. The evidence adduced focuses on the failure to post the positions. However, the testimony of the complainant and his two witnesses did not link this irregularity with the union's stratagem to favour certain members at the expense of the complainant and the other union members who were not informed that these routes were available.

In the instant case, the union clearly established that it had seriously examined the complainant's problem and that it had met with the employer, while strictly observing the various steps in the grievance procedure, up to and including the setting of a date for the arbitration hearing. The withdrawal of the first grievance did not result from capriciousness or serious negligence that amounted to inexcusable incompetence. On the contrary, the evidence revealed that the union had valid reasons for abandoning the complainant's first grievance, in particular the general agreement negotiated with the employer under which the positions were to be staffed permanently beginning in June 1994.

With respect to the second grievance, the complainant is attempting in the present case to make the union bear the consequences of his own tardiness. His complaint that his union breached its duty of fair representation when it withdrew this second grievance does not withstand scrutiny and is clearly unfounded.

For these reasons, the Board finds that the union did fulfill its duty to represent the complainant fairly. In light of both the oral and documentary evidence adduced, the Board has no hesitation in dismissing the complaint.

This is a unanimous decision.

  
\_\_\_\_\_  
Jean L. Guilbeault, Q.C.  
Vice-Chairman  
\_\_\_\_\_  
François Bastien  
Member  
\_\_\_\_\_  
Véronique L. Marleau  
Member



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## Summary

United Steelworkers of America, *applicant*,  
and Echo Bay Mines Ltd., *employer*.

Board File: 555-4047  
CLRB/CCRT Decision no. 1169  
June 28, 1996

## Résumé

Métallurgistes unis d'Amérique, *requérant*, et  
Echo Bay Mines Ltd., *employeur*.

Dossier du Conseil: 555-4047  
CLRB/CCRT Décision n° 1169  
le 28 juin 1996

Echo Bay Mines operates a gold mine in the Northwest Territories. Its operational head office in Canada is in Edmonton, Alberta. In early 1995, Echo Bay became subject to an organizing campaign by the United Steelworkers of America.

The organizing campaign, and the issues that arose as a consequence, have resulted in a series of applications being brought before the Canada Labour Relations Board.

In an application dated April 12, 1996, the union filed two complaints pursuant to sections 94 and 96 of the Code as well as an application for certification pursuant to section 24. As part of the relief requested the union requested that the Board order a vote pursuant to section 29(1) of the Code.

Upon receipt of the application the Board's Registrar sent the Board's standard letter to the employer requiring it to post a "notice to employees" and requesting it to provide certain information, including employee lists, to the Board for the purposes of its investigation and consideration of the section 24 application.

Echo Bay Mines exploite une mine d'or dans les Territoires du Nord-Ouest. L'administration centrale de son exploitation au Canada est à Edmonton, en Alberta. Au début de l'année 1995, Echo Bay a fait l'objet d'une campagne de syndicalisation menée par le syndicat des Métallurgistes unis d'Amérique.

Les questions soulevées dans le cadre de cette campagne ont suscité la présentation de nombreuses demandes devant le Conseil canadien des relations du travail.

Dans une procédure datée du 12 avril 1996, le syndicat a déposé deux plaintes fondées sur les articles 94 et 96 du Code ainsi qu'une demande d'accréditation fondée sur l'article 24. Le syndicat demandait entre autres au Conseil d'ordonner la tenue d'un scrutin en vertu du paragraphe 29(1) du Code.

Dès réception de la demande, le Greffier du Conseil a envoyé à l'employeur une lettre type pour lui demander d'afficher un «Avis aux employés» et de fournir au Conseil certains renseignements, notamment des listes d'employés, aux fins de son enquête et de l'examen de la demande présentée en vertu de l'article 24.

The employer refused to post the notice or to supply the information requested by the Registrar. The rationale for its refusal to do either was based on the argument that the union's request for a vote was, in essence, requested as a remedy on the section 94 and 96 complaints and is not normally available pursuant to section 29(1) as part of a section 24 application. The employer also raised the issue of the confidentiality of the information which would be provided to the Board.

After being made aware of the employer's refusal, the Board, in light of Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724, immediately convened a *viva voce* hearing in Ottawa to address the matter of the production of the information requested.

The Board reviewed the authority it confers to the Registrar pursuant to section 16 of the Code as well as the exercise of said authority pursuant to section 10 of the Board's Regulations. It concluded that the Registrar, having received an application and determined that the rights of employees could be affected, was entitled, pursuant to section 16(k) and (g) of the Code and section 10(2) of the Regulations, to require that the notice be posted by the employer as directed.

As well, it concluded that the information required in the Board's initial letter to the employer, was required for the purposes of the Board completing its investigation and consideration of any matter within its jurisdiction.

L'employeur a refusé d'afficher l'avis ou de fournir les renseignements demandés par le Greffier. Il fondait son refus sur le fait que, selon lui, la demande du syndicat de tenir un scrutin était essentiellement un redressement demandé dans le cadre des plaintes fondées sur les articles 94 et 96 et qu'elle ne pouvait normalement pas, aux termes du paragraphe 29(1), être présentée dans le cadre d'une demande fondée sur l'article 24. L'employeur a également soulevé la question de la confidentialité des renseignements qui seraient fournis au Conseil.

Après avoir été mis au courant du refus de l'employeur, le Conseil, à la lumière de l'affaire Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes, [1993] 3 R.C.S. 724, a immédiatement convoqué la tenue d'une audience à Ottawa pour examiner la question de production des renseignements demandés.

Le Conseil a passé en revue les pouvoirs qu'il délègue au Greffier par l'article 16 du Code ainsi que l'exercice de ces pouvoirs régis par l'article 10 de son Règlement. Il conclut que lorsque le Greffier, ayant reçu une demande et déterminé que les droits des employés pouvaient être touchés, est en droit, en vertu des alinéas 16k) et g) du Code ainsi que du paragraphe 10(2) du Règlement, de demander à l'employeur d'afficher l'avis comme il lui a été demandé.

De plus, il conclut que les renseignements requis dans la lettre initiale du Conseil à l'employeur, étaient demandés par le Conseil afin qu'il puisse terminer son enquête et examiner toute affaire relevant de sa compétence.

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The employer's concern with respect to the preliminary question of whether or not the certification application is properly before the Board, or whether or not, on the merits, the remedy requested by the union should be granted, are issues that are properly determined after the investigation is completed and prior to the Board providing its ultimate order with respect to the section 24 application. The Board accordingly ordered the employer to produce forthwith the information requested in the Registrar's letter and directed the posting of the required notice.

Les préoccupations de l'employeur quant à la question préliminaire de savoir si la demande d'accréditation est recevable, ou si, sur la question du bien-fondé, le redressement demandé par le syndicat devrait être accordé sont des questions qui ne sont tranchées qu'après l'enquête terminée et avant que le Conseil ne rende sa décision définitive quant à la demande fondée sur l'article 24. Le Conseil ordonne donc à l'employeur de fournir immédiatement les renseignements demandés dans la lettre du Greffier et d'afficher l'avis requis.



## Reasons for decision

United Steelworkers of America,

*complainant,*

*and*

Echo Bay Mines Ltd.,

*employer.*

Board File: 555-4047

CLRB/CCRT Decision no. 1169

June 28, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Patrick H. Shafer and Ms. Véronique L. Marleau, Members.

### Appearances:

Mr. Mark Rowlinson, for the applicant; and

Mr. Tom Wakeling, for the employer.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chairman.

### I

Echo Bay Mines Ltd. ("Echo Bay" or "the employer") operates a gold mine in the Northwest Territories. Its labour relations matters are managed at the mine site, as required, or directly from its offices in Edmonton, Alberta. Since early 1995, Echo Bay has been the subject of an organizing campaign by the United Steelworkers of America (the "Union"). This campaign and issues such as union access to the worksite and unfair labour practice complaints have brought the parties before the

Board on a number of occasions in the past year and a half; see Echo Bay Mines Ltd. (1995), as yet unreported CLRB decision no. 1140 (application filed with the Federal Court on November 20, 1995 (Board file no. 760-110), and affirmed by the F.C.A. (A-676-95) on February 22, 1996 with respect to Echo Bay Mines Ltd.: Board order issued on May 19, 1995 (file no. 800-33), Board order issued on June 27, 1995 (file nos. 530-2418 and 745-5105) and Board order issued on December 19, 1995 (file no. 745-5159)).

On April 12, 1996, the Union filed three further applications. The basis for these three applications is set out in a single letter in which the union requests the following relief:

*"1) Pursuant to Sections 94 and 96 of the Code, the Union requests an Order that Echo Bay Mines Ltd. (the 'Employer') be directed to reinstate forthwith to his former position at the Lupin operation of Echo Bay Mines Ltd., Mr. Norm Smith. It is the Union's submission that the termination of Smith was motivated in whole or in part by Smith's Union activity and by a desire on the part of the Respondent to interfere with the formation of a Trade Union in violation of the Canada Labour Code.*

*2) Pursuant to Sections 94 and 96 of the Code, the Union requests an Order that Echo Bay Mines Ltd. (the 'Employer') and persons acting on behalf of the Employer be directed to cease and desist interference with the formation and administration of the Union and interference with the representation of employees by the Union. The Union further alleges that the Employer's actions are designed to intimidate and coerce employees contrary to Section 96.*

*3) Pursuant to Section 24(2)(a) of the Code, the Union applies for Certification and requests that the Board Order a representation vote pursuant to Section 29(1) of the Code."*

(pages 1-2; emphasis added)

The bargaining unit for which the Union sought certification was described as follows:

*"All employees of Echo Bay Mines Ltd. including the nurses, at its Lupin Mine located approximately 300 kilometres north of the City of Yellowknife, Northwest Territories save and except Fore persons and Shifters and persons above the rank of Fore persons and Shifters, office, clerical, technical staff, surveyors, weather persons and professional engineers operating in a professional capacity."*

(page 8 of the Union's application)

The union alleges that the activities of the Employer since the beginning of the organizing campaign, including the unfair labour practice allegations contained in the earlier portion of the present complaint, have been such as to purposely frustrate the organizing campaign. For that reason, the Union requests that a representation vote, pursuant to section 29(1) of the Code, be held for the purposes of satisfying the Board as to whether or not:

*"... the employees in the unit wish to have the Steelworkers represent them as their bargaining agent."*

(page 8)

On April 18, 1996, the Regional Director/Registrar, following the Board's usual procedure, sent a letter to the Employer, which contained the following excerpt:

*"2. Appointment of Investigating Officer and the Filing of Information Required by the Board*

*Pursuant to the provisions of Section 16(k) of the Code, the Board has appointed Mr. R.J. O'Hara, Senior Labour Relations Officer, of the above address, to investigate the application. The Code requires that you provide the investigating officer with all the information required in the course of the investigation. The investigating officer will be contacting you within the next few days.*

*In the meantime, in order that the investigation may be completed as quickly as possible, the Board requests that you prepare the following material which will be required by the investigating officer:*

*(a) A list showing the full name, classification or job title of all employees, including managerial and supervisory personnel, employed by Echo Bay Mines Ltd. at the Lupin Mine, as of April 12, 1996, which is the date the application was filed.*

*(b) A second list showing the full name, classification or job title, home address and telephone number of all employees affected by this application.*

*(c) A clear indication on each list of all casual or part-time employees.*

*(d) A record of the weekly hours worked by any casual or part-time employee for the three-month period preceding the date on which the application was filed.*

*(e) An organizational chart showing the relationship of the employees in the proposed bargaining unit to the other employees, and also showing the lines of authority between management, supervisors and subordinate employees.*

*The parties will receive a copy of the investigating officer's report, containing all the information supplied to the Board, with the exception of evidence indicating the wishes of the employees. Such evidence is not made public in compliance with Section 25 of the Canada Labour Relations Board Regulations.*

*... "*

(pages 2-3, emphasis added)

The Employer refused to post the required notice and to provide the balance of the information requested by the Registrar. This led to an exchange of letters between the Board and the parties. The position of the parties, and the Board's directives with respect to the same, is made clear in the correspondence itself.

On April 25, 1996, counsel for the employer sent the following letter to the Board:

*"We acknowledge receiving your April 18, 1996 letter and enclosures on April 22, 1996.*

*We have reviewed both your correspondence and the union's application contained in Mr. Williams' April 12, 1996 letter to the Board. The union's application for a representation vote is pursuant to section 29(1) of the Canada Labour Code ('Code'). This is set out at the top of page 2 and page 8 of the union's application. Section 29(1) of the Code provides:*

*'The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.'*

*This section is a remedial power granted to the Board which allows them to order a representation vote in certain circumstances. This section can be contrasted with section 29(2) of the Code which provides:*

*'Where a trade union applies for certification as a bargaining agent for a unit in respect of which no other trade union is a bargaining agent, and the Board is satisfied that not less than thirty-five percent and not more than fifty percent of the employees in the unit are members of the trade union, the Board shall order that a representation vote be taken among the employees in the unit.'*

*As the union has not applied for a representation vote pursuant to section 29(2) of the Code, it is Echo Bay's position that the appointment of an investigating officer in order to establish a voter's list and the requirement to post the Notice to Employees at the worksite is premature. The Board has neither ordered a representation vote pursuant to section 29(1) of the Code nor has the union applied for a representation vote pursuant to section 29(2). We are not aware of any statutory authority which allows an investigation and the preparation of a voter's list along with the posting of the Notice to Employees as proposed by you under the current circumstances. Consequently, Echo Bay will not be posting the Notice to Employees at the worksite nor will it be providing the investigating officer with the information requested at this time.*

*We look forward to your response to the points raised in this letter so that this matter can be clarified.*

*We have faxed a copy of this letter to counsel for the union today."*

On April 29, 1996, counsel for the Union provided the Board with the following response:

*"On April 12, 1996, the Union filed an Application for Certification pursuant to Section 24 of the Code. Accompanying the Application for Certification was an Unfair Labour Practice Complaint filed pursuant to Sections 94 and 96 of the Code.*

*We are in receipt of a letter from Employer counsel to Mr. Kirkland dated April 25th, 1996. A copy of that letter is attached hereto for your reference.*

*On page 2 of that letter, counsel for the Employer states 'Echo Bay will not be posting the Notice to Employees at the worksite nor will it be providing the investigating officer with the information requested as this time.'*

*This is a direct challenge to the authority of the Board. Section 16(a) of the Code specifically grants the Board the power to compel the production of documents and things as deemed requisite to a full investigation and consideration of any matter before the Board. Section 16(g) of the Code specifically grants the Board the power to compel the Employer to post and keep posted any notice that the Board considers necessary to bring to the attention of any employee any matter relating to the proceeding.*

*This Employer has continually interfered with the rights of the employees and the Union. This Employer has engaged in conduct which shows a flagrant disregard for the Board and its authority. The Board's request that the Employer provide to the Board a list of employees and that the Employer post a notice at the worksite are common place. The Employer's refusal to provide this basic information and refusal to post the traditional notice is yet another attempt by this Employer to interfere with the rights of the Employees and to undermine the authority of the Board. We request that this matter be dealt with on an urgent basis - in the same fashion that the Board would act if the Union were engaged in an illegal strike. We request that the Board order the Employer to provide the information and to post the Notices and that the Orders be filed in the Federal Court of Canada pursuant to Section 23 of the Code."*

After reviewing their representations, the Board, on May 1, 1996, directed the parties as follows:

*"In light of the employer's letter of April 25, 1996 the Board directs that a hearing shall be held on Friday, May 3, 1996, commencing at 10:00 a.m. at the C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ontario.*

*The proceeding shall be held for the purposes of the Board ordering the production of such documents as are required by it, pursuant to section 16(a) of the Code, for the purposes of its full investigation and consideration of the within matter.*

*The employer is hereby required to produce, at the hearing, an employees list and shall show cause why it considers that the same is not required by the Board for its full investigation and consideration. In addition, the employer shall show cause why it has refused, as indicated in its letter of April 25, 1996, to post the 'notice to employees' as required by the Board's Regulations and procedure.*

*Pursuant to section 16(m) of the Canada Labour Code, and section 20 of the Regulations Relating to the Canada Labour Relations Board, the Board hereby abridges the time limits required for the above-noted hearing."*

(emphasis added)

In response to the Board's directive, counsel for the Employer sent a further letter, dated May 1, 1996:

*"In your May 1, 1996 letter you notify the parties that a hearing has been scheduled on May 3, 1996 in Ottawa. We will appear if the Board feels it is necessary to resolve the issues raised by our April 25, 1996 letter to Mr. Kirkland. But a hearing may not be necessary as we are content to have the Board decide the issues raised in our April 25, 1996 letter after reviewing our submissions and any written submissions the United Steelworkers of America ('union') makes.*

*There are three issues.*

*First, has the union in its April 12, 1996 letter to the Board applied for certification, or is it merely asking the Board to order a representation vote as a remedy for alleged unfair labour practices? The union's April 12, 1996 letter is unclear. On page 8 of its April 12, 1996 letter the union states that 'In order to protect the freedoms granted to the employees and to discourage the unlawful Employer activity, the Union requests that the Board order a representation vote for the purpose of satisfying itself as to whether the employees in the unit wish to have the Steelworkers represent them as their bargaining agent'. This language tracks the wording of section 29(1) of the Canada Labour Code ('Code'), which, in our view, grants the Board the discretionary power to order a vote if evidence of major support is tainted or the Board concludes that a representation vote is an appropriate remedy. The union has not relied on sections 28 or 29(2) of the Code, which it should do if it claims either majority support or enough support to warrant a mandatory representation vote. The Code provisions the union relies on are consistent with Echo Bay's interpretation of the union's April 12, 1996 letter. Section 9(d) of the Canada Labour Relations Board Regulations, 1992 ('Regulations') directs that the union provide 'full particulars of the facts and grounds supporting the application'. In addition, it would appear that the union has not filed a 'separate and confidential statement of the exact number of employees in the bargaining unit that the applicant claims to represent as members', as section 27(2) of the Regulations direct. The absence of this document also suggests that the union is seeking a representation vote as a remedy.*

*Second, if the union's April 12, 1996 letter is an application for a representation vote as a remedy, is the direction of the Board to post a notice of application for certification and to request information about Echo Bay's employees premature? Echo Bay takes the position that the Board's direction is premature. The Board does not have the authority to make these orders until it has ordered that a representation vote be held. No application for certification has been made. The union has simply requested that the Board order a representation vote as a remedy.*

*If Echo Bay is wrong and the Board concludes that the union has applied for certification, in spite of the union's failure to invoke either sections 28 or 29(2) of the Code, provisions which contemplate a union claim of either majority support or enough support to warrant a mandatory representation vote, and its apparent failure to comply with section 27(2) of the Regulations, Echo Bay concedes that section 10(2) of the Regulations authorizes the Registrar to require Echo Bay to 'immediately post any notices of the application that are provided by the Board'.*

*The third issue relates to the Board's authority to disclose confidential Echo Bay information to the union. On page 4 of Mr. Kirkland's April 18, 1996 letter he indicates that the 'information provided by the employer will be disclosed to the union ... with the exception of the list showing addresses and telephone numbers of employees'. Echo Bay asserts that the names of its employees are confidential and does not have in its possession any employee's authorization to release his or her name to the Board or the union or both. The union does not require the names of Echo Bay's employees to effectively advance its application. The Board certainly has no jurisdiction to require Echo Bay to provide the union with information that may assist it in evaluating the wisdom of future applications.*

*Echo Bay is aware that section 17 of the Regulations allows it to request that 'a document filed with the Board be treated as confidential and may limit access to the documents to those persons whom the Board designates'. If the Board orders Echo Bay to produce the material described in Mr. Kirkland's April 18, 1996 letter it will make a section 17 request. "*

(emphasis added)

## II

Pursuant to the Board's directive, a viva voce hearing was held in Ottawa, on May 3, 1996. Representatives of the parties attended. Counsel for the Employer, relying on the arguments contained in the above letter, focussed essentially on whether or not the original application, in the form in which it had been presented to the Board, was in fact a "certification" application as contemplated by section 24 of the Code, or whether the vote application pursuant to section 29(1) was simply requested as a remedy in the section 94 applications. Counsel indicated that if the Board determined that the certification application was, in the circumstances, properly before the Board, the Employer would comply with the Board's request set forth in its letter of April 18, 1996.

### III

The first two issues, delineated in the Employer's letter of May 1, 1996, i.e., (1) whether the Union applied for certification, or merely asked the Board to order a representation vote as a remedy for alleged unfair labour practices, and (2) if so, whether the Board's direction to post a notice of application for certification and its request for information about Echo Bay's employees is therefore premature, will be dealt with together.

The relevant portions of section 16 of the Code, provide as follows:

*"16. The Board has, in relation to any proceeding before it, power*

*(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;*

...

*(d) to examine, in accordance with any regulations of the Board, such evidence as is submitted to it respecting the membership of any employees in a trade union seeking certification;*

...

*(f) to make such examination of records and such inquiries as it deems necessary;*

*(g) to require an employer to post and keep posted in appropriate places any notice that the Board considers necessary to bring to the attention of any employees any matter relating to the proceeding;*

...

*(k) to authorize any person to do anything that the Board may do under paragraphs (b) to (h) or paragraph (j) and to report to the Board thereon;"*

Section 10(2) of the Regulations provides:

*"10. (2) Where the rights of employees could be affected by an application, the Registrar may, in writing, require any employer or a trade union to do one or both of the following:*

*(a) immediately post any notices of the application that are provided by the Board, for the period that the Registrar prescribes, in places where those notices are most likely to come to the attention of the employees who are concerned or may be affected by the application;*

*(b) inform the employees who are concerned or may be affected by the application of the filing of the application in the manner that the Registrar directs."*

(emphasis added)

## **POSTING THE NOTICE**

The Board's authority to compel the Employer to post the notices is derived from section 16(g) of the Code. The Registrar/Regional Director receives his authority to conduct an investigation, request information and require the posting of notices, through delegation by the Board pursuant to section 16(k). The Board authorized and directed the Registrar to require the posting of the said notices, where the circumstances set forth in section 10(2) of the Regulations are present.

There is no obligation on the Registrar, within section 10(2), to decide whether or not the application filed is jurisdictionally or jurisprudentially appropriate. The only determination that must be made by the Registrar, upon receipt of an application, is whether or not the rights of employees "could be affected by an application". On determining that such is the case, the Registrar may then require the Employer to post any notice of the application as directed.

In the present application, the Union specifically applied for certification pursuant to section 24(2)(a) of the Code. Having received an application and determined that the rights of the employees could be affected, the Registrar, on behalf of the Board, was entitled, pursuant to section 16(k) and (g) of the Code and section 10(2) of the Regulations, to require that the notices be posted by the employer as directed. The object of the Code, as reflected in the Regulations, is to bring to the attention of employees any application that may affect their rights at the employer's workplace, as quickly as possible upon the filing of the application. Although arguments, such as those proffered by the Employer here, may be made when the Board considers and determines the application itself, they cannot operate so as to interfere with the Board's investigation or deflect the employer's statutory obligation to post the notices in such fashion as required by the Board.

#### **PRODUCTION OF THE INFORMATION REQUESTED IN THE BOARD'S LETTER OF APRIL 18, 1996**

In addition to its refusal to post the Notice to Employees, the Employer also refused to provide the Board with the investigatory information requested by the Registrar.

The information (including the employees list) requested by the Registrar in his letter of April 18, 1996, is information which the Board, **as a matter of course**, requires all employers in certification applications to provide in an expeditious manner, pursuant to sections 16(d), (f) and (k), of the Code, to enable the Board to complete a "full investigation and consideration of any matter within its jurisdiction". If the Board is to fulfill its mandate under the Code, and the certification process envisioned thereunder is to operate in an effective and efficient fashion, with the dispatch that is required, the information routinely requested by the Registrar at the outset must be provided by the employer forthwith. To permit otherwise would allow the

certification process to be waylaid with preliminary objections unrelated to the Board's investigative functions envisioned under section 16 of the Code.

By its very nature, the Canada Labour Relations Board must rely on documentary information to make its decisions in representational cases in a timely and effective fashion. As a matter of course, all the appropriate jurisdictional and interpretative questions put before it are determined by the Board prior to its ultimate decision to grant or refuse an application. However, the Board's investigatory powers and processes cannot be delayed or derailed, particularly in representational matters, until all of the jurisdictional and legalistic concerns of the employer have been disposed of.

The Employer's concerns with respect to the preliminary question of whether or not the certification application is properly before the Board, or whether or not, on the merits, the remedy requested by the Union should be granted, are issues which are to be determined after the investigation has been completed and prior to the Board providing its ultimate order with respect to the section 24 application.

In addition, at this stage of the proceedings, the success of the Employer's arguments depend, at best, on a determination that the form of the certification application should prevail over its substance, since - according to the Employer - the usual form for filing the application was not followed. However, the complete answer to that argument is contained within section 114 of the Code, and section 5 of the Regulations, which provide that:

*"114. No proceeding under this Part is invalid by reason only of a defect in form or technical irregularity."*

\* \* \* \* \*

*"5. In any proceeding before the board, the use of the forms provided by the Board is not essential."*

Section 16(a) of the Code authorizes the Board to compel the production of such documents that it deems necessary for the full investigation and consideration of any matter. Although all of the issues will be "considered" by the Board before a final determination, the fact is that the documents requested by the Registrar in his letter of April 18, 1996, are necessary for the purposes of the Board's "full investigation and consideration" of the section 24 application.

The requirement for the employer to post the appropriate notices and provide the requisite information, is in no way determinative of the merits of the application, nor of the preliminary issues. Posting the notices and providing the information when directed by the Board to do so, pursuant to section 16 of the Code, merely ensures that the Employer complies with its statutory obligations, and provides the Board with the information required for the full investigation and consideration of the matter before it.

Accordingly, the issue of whether or not the vote requested by the Union in the present case is appropriate, on its merits, has nothing whatsoever to do with the Board's right to require the parties to produce such documents and information that the Board deems necessary for its purposes pursuant to section 16 of the Code and to conduct such investigation as is necessary for its consideration of the certification application itself.

In light of the decision of the Supreme Court of Canada in Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724, (see also Curragh Resources Inc. and Anvil Range Mining Corporation (1996), as yet unreported CLRB decision no. 1160), an employer's failure or refusal to provide such information as requested by the Registrar, in the time limits as directed, may result - as in the present case - in the Board immediately convening a viva voce hearing in Ottawa for the purposes of compelling the production of the information pursuant to section 16(a).

#### IV

The third issue raised by the Employer relates to the Board's authority to disclose confidential information to the Union.

We expect that most parties who are familiar with the Board's policy do not share the Employer's concern regarding the confidentiality of the information provided to the Board. However, in the circumstances, it is perhaps necessary to reiterate the Board's policy, in a general way, to ensure an understanding of the same.

Ordinarily the Board receives two specific employee lists from the employer: one with the names, addresses and telephone numbers of all employees and one without. In the course of the Board's investigation, the latter is provided to the union to give it the opportunity to make representations with respect to the employee complement that it deems to be within the unit sought. The remaining information is kept confidential and is only utilized, as required, for the purposes of the Board's investigation and deliberation. The Board carefully guards the trust that has been given to it by all parties in the labour relations community to obtain the information only for its investigative purposes and to carefully respect the confidentiality of the same.

However, the real issue here is not one of the Board's authority to disclose confidential information - or even whether the application is procedurally or jurisprudentially proper - but rather, of its authority to compel the employer to disclose the required information to the Board in order for it to deal with the application before it. That the Board has such power under the Code is clear; the manner in which it is exercised, in certain circumstances, is the only thing that may come into question.

Where a party fails to provide information required or requested by the Board for the purposes of the investigation and consideration of a matter before it, the Board, in the appropriate circumstances will not hesitate to convene an immediate viva voce hearing for the purposes of compelling the production of the same pursuant to section 16(a) of the Code.

V

Following the representations of the Employer at the formal hearing in Ottawa on May 3, 1996, the Board, for the reasons set forth above, ordered as follows:

*"1. The employer shall forthwith provide to the Board:*

*(a) a list showing the full name, classification, and job title of all employees, including managerial and supervisory personnel, employed by Echo Bay Mines Ltd., at the Lupin Mine, as of April 12, 1996;*

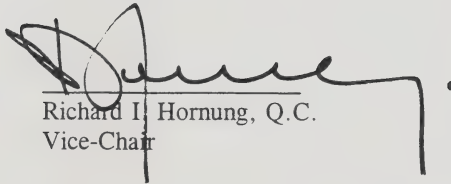
*(b) a second list showing the full name, classification or job title, home address and telephone number of all employees affected by this application;*

*(c) such further information as required and set forth in the Board's letter to the employer dated April 18, 1996.*

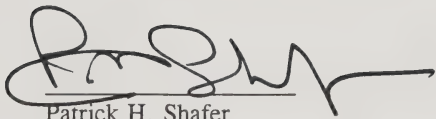
*2. The employer shall forthwith post the Notice to Employees provided to the employer with the Board's letter of April 18, 1996."*

Although the attached Order was granted by the Board and provided to the parties on May 3, 1996, the Board deemed it necessary to nevertheless issue these reasons for the purposes of both clarifying its position and providing the labour relations community with instructive guidelines with respect to the production of documents and information as required in the Board's investigatory process.


For information purposes, the Board's entire Order is attached as Appendix "A" to this decision.



Richard I. Hornung, Q.C.  
Vice-Chair



Patrick H. Shafer  
Member



Véronique L. Marleau  
Member



**IN THE MATTER OF THE**

Canada Labour Code

- and -

United Steelworkers of America,

applicant,

- and -

Echo Bay Mines Ltd.,

employer.

**WHEREAS** the United Steelworkers of America filed a certification application with the Canada Labour Relations Board on April 15, 1996, pursuant to section 24 of the Code, for a unit of employees of Echo Bay Mines Ltd.;

**AND WHEREAS**, by letter to the parties dated April 18, 1996, the Registrar of the Board directed the employer to post a Notice to Employees at the worksite pursuant to section 10(2) of the Regulations of the Canada Labour Relations Board;

**AND WHEREAS**, by that same letter the Registrar of the Board requested the employer to provide the Board with an employee list;

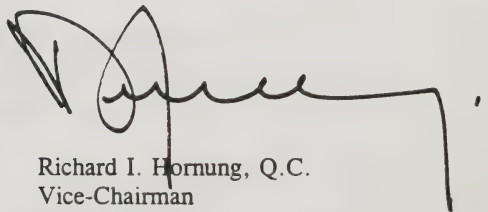
**AND WHEREAS**, the employer, by letter dated April 25, 1996, advised that it would not provide the list of employees to the Board's Investigating Officer, nor would it post the Notice to Employees as requested;

**AND WHEREAS**, consequent upon receipt of the said letter from the employer the Board held a formal hearing in Ottawa on May 3, 1996, for the purposes of ordering the production of such documents and requiring the posting of the Notice to Employees pursuant to section 16 of the Canada Labour Code;

**NOW THEREFORE**, the Board orders as follows:

1. The employer shall forthwith provide to the Board:
  - (a) a list showing the full name, classification, and job title of all employees, including managerial and supervisory personnel, employed by Echo Bay Mines Ltd., at the Lupin Mine, as of April 12, 1996;
  - (b) a second list showing the full name, classification or job title, home address and telephone number of all employees affected by this application;
  - (c) such further information as required and set forth in the Board's letter to the employer dated April 18, 1996.
2. The employer shall forthwith post the Notice to Employees provided to the employer with the Board's letter of April 18, 1996.

**ISSUED** at Ottawa this 3rd day of May, 1996.



Richard I. Hornung, Q.C.  
Vice-Chairman

# Information

*This is not an official document. Only the Reasons for decision can be used for legal purposes.*

*Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.*

## Summary

Communications, Energy and Paperworkers Union of Canada (CLC), Communications, Energy and Paperworkers Union of Canada, Local 141, *applicant*, and Coopérative des travailleurs routiers, Trans-Coop, Provost Cartage Inc./Provost Bulk Transport Inc. and Richard Messier, *respondents*.

Board Files: 560-321, 585-557, 725-358, 745-4936 and 750-026  
CCRT/CLRB Decision no. 1170  
July 9, 1996

This decision deals with a number of applications filed by the union asking the Board to declare that Provost is the real employer of the Quebec depot operations or, subsidiarily, that Provost and Coop are a single employer within the meaning of the Code or that there has been a partial sale of business (the Quebec depot) to the Coop.

Labour relations between Provost and the union at the time, for all its operations, including those related to the Quebec depot, were governed by a collective agreement.

In August 1994, Provost entered into a franchise agreement with Coop assigning it all rights to operate the Quebec depot. To this end, the employees of the depot formed a co-operative. Those who chose not to join were informed by Transport Provost that they were being laid off.

## Résumé

Syndicat canadien des communications de l'énergie et du papier (CTC), Syndicat canadien des communications de l'énergie et du papier, section locale 141, *requérant*, et Coopérative des travailleurs routiers, Trans-Coop, Les Transports Provost Inc./Provost Bulk Transport Inc. et Richard Messier, *intimées*.

Dossiers du Conseil: 560-321, 585-557, 725-358, 745-4936 et 750-026  
CCRT/CLRB Decision n° 1170  
le 9 juillet 1996

La présente décision porte sur plusieurs demandes présentées au Conseil par le syndicat lui demandant de déclarer que Provost est le véritable employeur du dépôt de Québec ou, subsidiairement, que Provost et la Coop constituent un employeur unique au sens du Code ou encore qu'il y a eu vente partielle d'entreprise (soit le dépôt de Québec) à la Coop.

Les relations de travail entre Provost et le syndicat à cette époque, pour l'ensemble de ses activités y compris celles reliées au dépôt de Québec, étaient régies par une convention collective.

En août 1994, Provost a conclu un contrat de franchise avec la Coop, cédant à cette dernière tous les droits d'exploitation du dépôt de Québec. À cette fin, les employés du dépôt ont formé une coopérative. Ceux qui ont choisi de ne pas se joindre ont été avisés de leur mise à pied définitive par Transport Provost.

The applicant alleged that in so doing, Provost contravened sections 94(3) and 96, and imposed an unlawful lockout contrary to section 92 by laying off a number of employees following the agreement entered into by the respondents.

The Board concludes that Coop, with respect to the employees working at the Quebec depot, has all the attributes of a true employer within the meaning of the Code. The Board declares that Provost and Coop are a single employer for the purposes of the Code. All the criteria for a declaration of single employer have been met and the desired labour relations purpose of such a declaration justified the exercise of the Board's discretion in the present case. This declaration will preserve the collective bargaining structure and will allow collective bargaining with the two entities having common control over the operations of the Quebec depot.

The Board exercises its discretion as per section 98(3) of the Code and refuses to hear and determine the complaint of unfair labour practices as it considers that the outcome sought could be decided by an arbitrator pursuant to the collective agreement.

Finally, it dismisses the application seeking a declaration of unlawful lockout on the grounds that the last of the three criteria required to order such a declaration, i.e. the element of intent, has not been met.

Le requérant allègue que, en agissant ainsi, Provost a contrevenu au paragraphe 94(3) et à l'article 96, et a imposé un lock-out illégal contrairement à l'article 92 en procédant à certaines mises à pied à la suite de l'entente survenue entre les intimées.

Le Conseil conclut que la Coop possède tous les attributs d'un véritable employeur au sens du Code à l'égard des employés qui travaillent au dépôt de Québec. Il déclare que Provost et la Coop constituent un employeur unique pour les fins du Code. Tous les critères requis pour faire une déclaration d'employeur unique ont été satisfaits et l'objectif de relations de travail recherché par une telle déclaration justifie l'exercice de la discrétion du Conseil en l'espèce. Cette déclaration préserve la structure de négociation collective établie et permet la négociation avec les deux entités sociales qui détiennent en commun le contrôle sur les activités du dépôt de Québec.

Le Conseil exerce sa discrétion selon le paragraphe 98(3) du Code pour refuser d'instruire la plainte de pratiques déloyales puisqu'il estime que les conclusions recherchées peuvent être décidées par un arbitre aux termes de la convention collective.

Finalement, il rejette la demande de déclaration de lock-out illégal pour le motif que la dernière des trois conditions requises pour ordonner une telle déclaration, soit l'élément intentionnel, n'a pas été remplie.

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## Reasons for decision

Communications, Energy and Paperworkers  
Union of Canada (CLC), Communications,  
Energy and Paperworkers Union of Canada,  
Local 141,

*applicants,*

*and*

Coopérative des travailleurs routiers, Trans-  
Coop, Provost Cartage Inc./Provost Bulk  
Transport Inc. and Richard Messier,

*respondents.*

Board Files: 560-321, 585-557,  
725-358, 745-4936 et 750-026  
CCRT/CLRB Decision no. 1170  
July 9, 1996

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The Board was composed of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chairman, and  
Mr. François Bastien and Ms. Sarah E. FitzGerald, Members.

### Appearances

Mr. Laurent Trudeau, for the Communications, Energy and Paperworkers Union of  
Canada;

Mr. Serge Belleau, for the Coopérative des travailleurs routiers, Trans-Coop;

Mr. Louis P. Bernier, for Provost Cartage Inc.

## **I. THE PROCEEDINGS**

These reasons for decision deal with a number of applications filed on October 24,  
1994 by the Communications, Energy and Paperworkers Union of Canada (hereinafter  
called "the applicant" or "the CEP") further to the franchise agreement concluded  
between Provost Cartage Inc. (hereinafter called "Provost") and the Coopérative des  
travailleurs routiers, Trans-Coop (hereinafter called "the Coop") concerning the

operation of the centre located in the community of St-Jean-Chrysostôme (hereinafter the "Quebec City depot").

More particularly, the applicant is asking the Board to declare that Provost is the sole employer at the Quebec City depot. Subsidiarily, it is asking the Board to declare that Provost and the Coop constitute a single employer within the meaning of the Code or that there was a partial sale of business to the Coop, in respect of the activities of the Quebec City depot. In support of its applications, the applicant relies on sections 16, 18, 35 and 44 of the Code.

The applicant also alleges that Provost contravened subsection 94(3) and section 96, and imposed an unlawful lockout contrary to section 92 by laying off certain employees further to the agreement concluded between the respondents. It is seeking the Board's consent to institute a prosecution under sections 100 and 104 of the Code.

The Board heard the parties' evidence and submissions regarding these applications on December 1 and 2, 1994, January 5 and 6, 1995, March 6 to 10, 1995, March 28 and 30, 1995, May 24 and 25, 1995 and July 5 and 7, 1995.

## II. THE FACTS

The CEP is the bargaining agent certified to represent the following unit:

*"all employees of Provost Cartage Inc./Provost Bulk Transport Inc., working in its premises in Quebec and Ontario, excluding office employees, sales representatives, dispatchers, canteen employees, maintenance employees, security guards, foremen and those above".*

(Board file no 580-184)

Local 141 of the CEP acts on behalf of the CEP for the purposes of negotiating and applying the collective agreement. The last collective agreement concluded between Provost and the CEP, as of the date of the present applications, expired on April 30, 1996. Twenty-four employees governed by the collective agreement were working at the Quebec City depot before the conclusion of the franchise agreement.

Provost is a business specializing in the transportation by tanker trucks of dry and liquid products from a number of depots in Quebec and Ontario. It operates in Canada and the United States.

Following deregulation of the trucking industry at the end of the 1980s, Provost's competitive position, and hence its share of the market served by the Quebec City depot, declined significantly. The proliferation of new competitors engaging in transportation activities incidental to the transporting of chemicals, Provost's main activity, the weakness of the Quebec City region market for transporting chemicals, the difficulty encountered by Provost in securing competitive rates for the transporting of products other than chemicals, and the successive financial losses it sustained resulted in Provost's running a deficit.

Mr. Jean-Paul Provost, chairman of Provost's board of directors, explained to the Board that, owing to these various factors, he decided, in the fall of 1993, to close his Quebec City depot. However, because he recognized the importance to his business of the Quebec City market and the need to maintain a presence there, he wanted to find alternatives that would enable him to meet this objective while at the same time protecting the jobs of his Quebec City drivers. It was with this in mind that he contacted, in November 1993, an expert on cooperatives, Mr. Richard Messier, on the recommendation of Mr. Jean-Pierre Léger, president of Rôtisseries St-Hubert. Mr. Messier had been responsible for converting certain St-Hubert restaurants to franchises, the operating rights of which had been transferred to employee cooperatives.

Following a number of meetings in December 1993, Mr. Messier was charged with conducting a feasibility study for the establishment of a cooperative of employees of the Quebec City depot who would acquire Provost's operating rights for all this territory. At the same time, Mr. Provost established an internal committee composed of Mr. Jean-Pierre Lefebvre, vice-president, human resources and communications,

and Mr. Gilles Caron, vice-president, finance and administration, to provide Mr. Messier with all the guidance and the information needed to develop the franchise and employee ownership concept. At the end of February 1994, Mr. Messier submitted his summary report. The document described the background of the initiative, the present situation, the offer to sell and its repercussions, and the timetable for the project.

The minutes of a quarterly meeting of the company's management committee held on August 12, 1994, although they postdate the announcement of the closing of the Quebec City depot, nevertheless summarize very well the testimony heard regarding the depot's situation and the options considered by the company's officers at the end of February 1994. The situation was described as follows:

*"In this regard, Jean-Paul Provost stated that in previous years, the company did nearly \$10 million of business annually in Quebec City, with approximately 90 employees. Over the years and following deregulation, the company ceased to be competitive and the volume of sales declined significantly. Today, with earnings of \$1.5 million, we are losing more than \$100,000 a year. This was why a decision had to be made and three options were available to us:*

- *Close the Quebec City depot:*
- *Sell the transportation component to another company*
- *Sell to the Quebec City employees, constituted as a workers cooperative, the transportation component..."*

(translation)

On the basis of this information, Provost's officers confirmed their intention to either end the activities of the Quebec City depot effective April 30, 1994, or transfer the business to a cooperative composed of employees and conclude a franchise agreement for the depot's operating rights. Mr. Jean-Paul Provost first informed his general manager for the eastern Quebec region, Mr. Yves Côté, of the situation on February 24, 1994, and organized a meeting that same day between Mr. Côté and Messrs. Richard Messier and Jean-Pierre Lefebvre. At this meeting, the concept of

an employee cooperative was explained to Mr. Côté as was his possible participation in it, once he became laid off, because of his knowledge of the business. Mr. Côté had been employed by Provost for some 22 years, including 17 as general manager of the eastern Quebec region.

On March 4, 1994, the company's officers informed the CEP's union executive of their decision. The union did not take a position at that time, stating that it was waiting to see what Mr. Messier had to propose. Provost's president testified that he had told the union executive at this meeting that the proposed franchise and cooperative concept would not mean the disappearance of the union. On the contrary, his opinion and that of the president of Rôtisseries St-Hubert who had suggested the idea to him was that the employees would continue to be unionized.

On March 13, 1994, a meeting of all the employees of the Quebec City depot was held at the employer's request. At this meeting, Mr. Jean-Paul Provost advised of his decision to close the Quebec City depot and suggested the possibility of forming a cooperative. Mr. Richard Messier explained the cooperative concept, the procedure involved and the need for as many employees as possible to participate. He also stated that the unionization of the employees would contribute to the success of the project.

At this meeting and following Provost's officers' and Mr. Richard Messier's departure, the employees discussed among themselves the position they should take regarding the establishment of an employee cooperative. The union representatives stated that the establishment of a cooperative (a group of "brokers in disguise") would mean that the union would not be able to defend the interests of an independent driver ("broker") vis-à-vis the interests of the Montreal drivers. Many drivers were also unhappy with the fact that they were being asked to make further sacrifices when the union had already made numerous concessions to the employer during the last round of bargaining. It was at this meeting that Mr. Yves Côté informed his fellow workers that he would be at their disposal if they in fact intended to form a cooperative. At the end of this meeting, a majority of the employees voted down the proposal.

On March 21, a dozen employees attended a meeting called by employees interested in the cooperative proposal. Mr. Richard Messier was invited by one of the organizers, Mr. Paul-Émile Lord, to attend the meeting and provide information and advice on the proposal. A decision was made at this meeting to establish a provisional committee. Once established, this committee had the active support of the former general manager of the Quebec City region, Mr. Yves Côté. He described his role within the group as that mainly of checking, in conjunction with an accountant, the figures used to determine the cost of setting up and operating a cooperative in the form of a franchise.

Moreover, the provisional committee relied on Mr. Richard Messier to act as a resource person and consultant in order to more clearly define and flesh out the proposal, and to help determine the content of the franchise agreement. From that day on, Mr. Messier also served as mediator between Provost and the employees, echoing either the proposals put forward by Provost or the employees' concerns regarding the establishment of the Coop and the negotiation of the franchise agreement. All of Mr. Messier's fees in this regard were paid by Provost.

It should also be noted that on May 6, 1994, the CEP sent a communiqué to its members and to Provost's employees in which it raised the union mentioned the possibility of working through a paragovernmental organization financed by the Ministère de l'Industrie, du Commerce et de la Technologie and dedicated to the establishment of shareholder\employee cooperatives. This initiative would be free of charge. Given this possibility, the union expressed surprise at the willingness of some employees to accept the services of a consultant paid by Provost to defend their interests.

On June 4, 1994, the CEP held a union meeting attended by fourteen employees of the Quebec City depot. At this meeting, two resolutions were passed by majority vote. The purpose of the first resolution was to authorize the CEP to "meet with the

company to find solutions for the employees of the Quebec City depot and temporarily to suspend discussions with Richard Messier"; the purpose of the second was to "suspend all discussions or plans concerning the Coop until the disclosure of information to the union". The applicant also stated on that occasion that legal action would be taken "to prevent the Coop from continuing" should it continue to operate despite the vote held at this meeting. The applicant admitted, however, that it could not prevent the formation of the Coop or Provost's decision to sell its business.

Subsequent to this meeting, the CEP gave Mr. Richard Messier notice, on June 6, 1994, to terminate all initiatives aimed at establishing a cooperative over the wishes of the employees expressed at the above-mentioned union meeting. The union never received a reply to the notice it gave Mr. Messier. Mr. Gilles Jauvin, the president of the CEP, then undertook to meet on June 8, 1994 with Provost's representatives, including the president, Mr. Jean-Paul Provost, to review the situation. The union asked the company to consider the possibility of making the Quebec City depot a satellite of the Anjou depot, modelled on the operations of Buckingham and Valleyfield. Mr. Provost made clear that this option could not be considered because conditions were very different in Quebec City, and that the only available options were those submitted to the employees at the meeting of March 13, 1994.

The first meeting between Provost's representatives and those of the provisional committee took place on May 16, 1994. There ensued numerous discussions and negotiations on the content of the agreement between the respondents. These discussions went on until August 1994 and dealt essentially with the following matters: the territory served by the Quebec City depot and the exclusive right to this territory; the opportunity for the Coop itself to acquire equipment; negotiation of the price of the services acquired from Provost by the Coop, and all the arrangements inherent in the terms and conditions of these services; the method for calculating the revenues derived by the Coop from transportation carried on as a partner of Provost; the amount and features of the equipment supplied by Provost; and the cost of the lease granted by Provost to the Coop.

On August 10, 1994, Mr. Yves Côté was hired by the provisional committee to serve as general manager of the Coop.

On August 15, 1994, the employees made a final application for incorporation as a cooperative. The professional fees associated with the incorporation of the Coop and the franchising contract, i.e., the services of an accountant and a lawyer, were not charged to the Coop. The latter was incorporated under the Cooperatives Act, R.S.Q., c. C-67.2, and its objectives are defined as follows in its constitution and by-laws:

*"1. To provide work to its members by operating a business specifically in the road transportation sector;*

*2. To encourage the participation of all its members by developing a cooperative environment."*

(translation)

Each member had to purchase ten common shares at \$10 apiece on joining the Coop. This contribution, totalling \$100 per member, was payable in September 1994. In addition, preferred shares were purchased through payroll deductions of 5% per pay.

On August 18, 1994, Provost's representatives and the Coop signed an agreement entitled "Franchise Agreement" for the transfer of the operating rights for the Quebec City depot.

Provost then offered the employees working at the Quebec City depot the following three options:

(1) to join the employees' Coop and receive severance pay upon receipt of their resignation from Provost; or

(2) not to join the Coop and receive severance pay immediately upon receipt of their resignation from Provost by waiving the recall

rights, valid for a two-year period, provided in the collective agreement; or

(3) not to join the Coop and retain the recall rights, valid for a two-year period, provided in the collective agreement without receiving severance pay. The employees could collect this pay upon request at the expiration of the two years or before the two years expired if they resigned and waived the recall rights.

Depending on their individual choices, Provost notified, on August 12, 1994, all the employees who had decided not to join the Coop that they would be permanently laid off effective September 3, 1994. These employees were Messrs. Normand Trépanier, Yvon Verreault, Jean-Guy Paquet, Hervé Marcoux, Jean-Claude Goulet, Jean-Paul Biron, Yvon Champagne, Réjean Gagnon, Richard Lord, Georges Breton, André R. Caron, Robert Blouin and Alain Bergeron.

Grievances challenging each of these layoffs and requesting reinstatement and compensation for lost pay and benefits were filed on August 28, 1994 in accordance with the procedure provided for in the collective agreement.

### **The franchise agreement and the management of activities**

Under the agreement concluded on August 18 1994, Provost sold the Coop a franchise whereby it grants it the preferential right to plan, coordinate and supervise the carrying on of the transportation activities relating to contracts entered into by Provost for the territory in the Province of Quebec located east and northeast of Quebec City and including, for the purpose of cement and petroleum products, the territory east of Montreal, excluding the James Bay Region.

Thus, the Coop serves a territory which is exclusive to it and within which, except in certain specified exceptional situations, it provides transportation services under the name "Provost Cartage".

For this purpose, Provost had to assume the following obligations. It agreed to entrust the Coop with the execution of contracts for transporting goods within the territory, and it had to supply the Coop with the necessary equipment to execute the contracts, in particular trucks, spare trucks and tanker trailers.

Provost also transferred to the Coop certain movables which are the subject of a movable hypothec with the Caisse populaire in order to secure a claim of \$20,000.

Provost undertook to lease to the Coop the facilities where the depot is located under the terms of a lease signed for this purpose. If the lease had to be terminated, the Coop had to find new facilities from which to operate its franchise, with the selection of the site and the terms of the lease to be negotiated to be subject to Provost's approval.

Provost agreed to keep in its employ a sales representative for the territory. The representative is responsible for *"meeting the customers, soliciting their business and negotiating rates for the transportation of goods"*. This representative must follow the instructions given by Provost with respect to the determination of transportation rates, which are set by Provost in consultation with the Coop.

Provost undertook to provide ongoing training to the Coop's drivers and mechanics to enable them to take examinations and obtain the required certificates and licences needed to perform their duties.

Advertising is also Provost's responsibility which pays for its placement in the various telephone directories. No advertising is to be done by the Coop without Provost's written consent.

Finally, Provost bills customers for all transportation services provided by the Coop and collects all amounts owed. Provost provides the Coop with a billing report. In the case of a delinquent customer, Provost absorbs the loss of revenues unless the Coop's liability is established. Provost remits payments to the Coop twice a month for the amounts it owes, net of the fee provided in the contract.

According to Mr. Jean-Pierre Lefebvre, this is the most practical way of collecting accounts. Thus, the Coop's financial statements reflect 100 % of its revenues for the purposes of determining its gross revenues. But as Provost collects and remits the amounts owed, net of fees, the Coop does not receive all its gross revenues. Moreover, service charges, where applicable, are also deducted by Provost from total revenues before remittance of the amounts collected.

In return for franchise rights, la Coop agreed to operate its business under the name "Provost Cartage", and in accordance with Provost's directives. Its members, employees and subcontractors must identify themselves by the name and colours of "Provost Cartage".

The Coop undertook not to engage in any other commercial activity and to refrain from transporting goods within the territory, for any other transportation company without first obtaining Provost's consent. Moreover, a no-competition clause in the contract prevents the Coop from engaging in activities that compete with those of Provost during the term of the contract and for a period of two years following its expiration. In addition, the franchise rights cannot be sold by the Coop without Provost's express consent.

With regard to financial matters, the Coop must provide Provost with a monthly report of its operating results, as well as annual financial statements. The Coop must use only bills of lading issued by Provost.

The Coop must maintain the tractors supplied by Provost in accordance with Provost's maintenance policy. According to Mr. Yves Côté, tanker trailers continue to be cleaned by a third party, in this case Gestion Hervé Inc., for Provost. Gestion Hervé Inc. does not bill the Coop for this service, the cost of which is eventually charged to the Coop by Provost.

Finally, Provost is authorized to dispatch, at any time during normal business hours, one of its representatives to the Coop's facilities to conduct a general inspection (equipment, activities) to ensure observance of the terms of the contract. To this end, the Coop must make available to the representative all the relevant documents.

Under the agreement, the Coop is an «independent contractor» of Provost and cannot bind it.

When the agreement was signed, the Coop had to pay Provost a franchise fee of \$10,000. This fee, however, was advanced by Provost and is to be recovered from the Coop within the twelve months following the commencement of its operations. Moreover, the Coop is subject to an annual fee of 10 % of its gross revenues as well as to applicable service charges that it must remit to Provost.

The franchise agreement, the initial term of which is five years, came into force on September 4, 1994. It renews automatically each subsequent year unless either party gives notice, 180 days before the renewal date, of its intention not to renew the agreement. However, should the Coop fail to discharge one of its undertakings, Provost has reserved the right to terminate the contract if the Coop fails to rectify this situation.

Constitutionally speaking, the evidence revealed that the Coop activities, which were transferred by the franchise agreement, are carried on in Quebec, Ontario, the Maritimes and the United States. Moreover, Mr. Yves Côté pointed out that during

the Coop's initial months of operation, 90% of the customers it served were still Provost's customers.

### **The management of human resources**

The Coop is responsible for the day-to-day management of the business's labour relations. The Coop determined the number of employees necessary to operate its franchise and the working conditions of the employees it hired.

The Coop did not retain the collective agreement concluded between the CEP and Provost as its own labour agreement with its employees.

A new labour agreement was instead drafted on July 11, 1994 by the provisional committee and approved by the Coop's board of directors and members to govern all aspects of labour relations. This agreement incorporates a number of the terms and conditions of employment in effect at Provost, namely rates of pay, work distribution rules and rules governing loss of seniority, layoff, rehiring and transfer. However, it contains the following differences:

- Seniority is now defined solely within the Coop and the seniority that existed before the formation of the Coop is transferred in the same order for the founding members (article 2);
- the number of paid statutory holidays is reduced from 12 to 8 (article 12);
- the vacation policy remains the same except that seniority at Provost is not considered for vacation purposes. Seniority in the cooperative determines the number of vacation days (article 16);
- trips in excess of 225 kilometres are now calculated on a lump-sum basis instead of according to a kilometric rate (article 19);

- reimbursement for accommodation is reduced from \$60 to \$50 per night for a motel and from \$18 to \$12 per night where a truck bunk is used (article 23);
- the amount of bereavement leave is reduced from five to three days for spouses and children and from three days to one day for in-laws.

It should also be noted that, as of the hearing dates, the new terms and conditions of employment did not include a retirement plan. The employees' group insurance coverage for the cost of dental work and corrective eyeglasses had also been withdrawn.

### **III. THE PARTIES' ARGUMENTS**

#### **THE CEP**

The applicant argues, first, that Provost is the true employer of the employees working at the Quebec City depot, the operating rights of which are now held by the Coop. According to the CEP, this determination will make it possible to establish the identity of the employer who is alleged to have declared the unlawful lockout and engaged in unfair labour practices.

In support of this argument, the CEP alleges that Provost is continuing to operate its business as before by using the same physical premises, serving the same clientele using the same tractors and trailers, and establishing its relations with the clientele in its name using the same telephone number. Moreover, the sales representative hired and paid by Provost was authorized, according to the CEP, to increase Provost's volume of business in Quebec City under the cover of the Coop.

In short, the CEP argues that the Coop is a creature of Provost which nevertheless retains its characteristics as an employer within the meaning of the Code. The CEP is therefore asking the Board to declare that Provost is the sole employer for the

purposes of all the activities it carries out in the territory of Quebec and Ontario, including the activities of the Quebec City depot, that the collective agreement in force binds it in respect of all its activities, including the activities of the Quebec City depot, that the bargaining unit remains intact and extended to the operations of the Quebec City depot, that the rules for assigning work are those that applied as of the date of the collective agreement, and that the employees must be immediately recalled to work and compensated for the pay and benefits which they were unjustly denied.

Subsidiarily, the applicant argues that Provost's and the Coop's operations of the transportation activities of the Quebec City depot (in terms of financing, method of operation and integration of activities) are so closely tied that they must be considered a single employer within the meaning of the Code. Since the bargaining rights and structure have been eroded by the agreement concluded between the respondents, the CEP argues that the Board is justified, for labour relations purposes, to exercise its discretion to issue a declaration of single employer under Section 35 of the Code. In this application, the CEP is seeking a declaration from the Board that Provost and the Coop are bound by the certification order it holds, by the existing collective agreement and by all the procedures arising therefrom, including the grievance and complaint procedures.

Should the Board reject its main arguments, the CEP is asking the Board to declare that there was a partial sale of Provost's business (i.e., the Quebec City depot) to the Coop and that the Coop is therefore bound by the collective agreement concluded between Provost and the CEP.

Finally, the CEP argues that Provost dismissed the majority of the unionized employees, 13 in all, on the pretext of laying them off permanently. In August 1994, 20 unionized truck drivers and 4 unionized mechanics were employed at the Quebec City depot, whereas in the wake of the agreement concluded between the respondents and the events that ensued, the 13 employees in question were laid off for refusing to exclude themselves from the bargaining unit and to give up their rights under the

collective agreement when Provost required them to resign, then apply for membership in the Coop and purchase common shares.

According to the CEP, Provost thus contravened subsection 94(3) and section 96 of the Code and, in so doing, also contravened section 92 of the Code by imposing an unlawful lockout on the employees working at the Quebec City depot.

The CEP argues that it took initiatives to reduce the operating costs of the Quebec City depot, to improve its viability and to obtain investment capital with the QFL's Fonds de solidarité, but that these initiatives were rejected by Provost.

The CEP further alleges that it was prevented from representing its members employed at the Quebec City depot when its efforts in this regard were thwarted by the threats and unilateral actions of Provost relating to its attempt to form a cooperative.

### **The Coop**

The Coop argues that, under the terms of the franchise agreement, it is a legal entity that is separate from Provost. There are important provisions in this agreement establishing that it is the only employer at the Quebec City depot. The Coop has, and exercises the right to plan, coordinate, supervise and carry on the transportation activities that are the subject of the contracts concluded for the territory served. It alone manages and directs its business and its commercial activities. It alone determines the working conditions of its employees, and the performance of their work is under the sole control of the Coop. Moreover, it alone holds its assets.

The Coop is asking the Board to dismiss all the applicant's applications.

## **Provost**

Provost argues that the formation of the Coop is the result of its losing money over a period of years. Thus, rather than close its Quebec City depot, as it had planned to do on April 30, 1994, and try and sell it to anyone willing to purchase the business, Provost chose instead to delay the closing date to give the employees of this depot a chance to form a cooperative and acquire the operating rights, if they wished to do so.

Provost argued that it offered the employees this opportunity, not to evade any right or obligation or to deny them union representation, but rather to offer the employees means of minimizing the consequences of the closing.

Moreover, Provost stated that it had a strict right to cease operating its depot, and even to close it. More important still, this right allowed it to sell the operating rights for this depot to a third part, in this case the Coop. In this regard, Provost admitted that there was a sale of business within the meaning of section 44 of the Code because it transferred the exclusivity of the operating rights for the Quebec City depot to the Coop (transcript of July 7, 1995, pages 75-76).

According to Provost, the Coop is an autonomous entity that is separate from and independent of Provost. Moreover, neither has any common manager or shareholder. The Coop is the only true employer of its employees, in respect of whom Provost exercises no control and issues no directive concerning the performance of work, the assigning of duties, pay, benefits or other terms and conditions of employment.

Finally, by laying off all its employees on September 3, 1994, Provost did nothing illegal and did not declare an unlawful lockout. It was simply exercising a right it had.

Consequently, with the exception of the application for a declaration of sale of business, Provost is asking the Board to dismiss the applications and the conclusions sought.

#### IV. DECISION

Before deciding all the applications filed by the applicant, the Board must identify, under subparagraph 16(p)(i), the real employer of the employees concerned for the purposes of the Code, in the wake of the franchise agreement concluded between the respondents. Identifying the real employer, as part of the present proceedings, will serve to determine whether the requirement of section 35 of the Code that there be two or more employers has been met.

With regard to the allegations of an unlawful lockout, it is clear that this application is directed against Provost because, on the date of the alleged events, i.e., at the time of the layoffs, the employees in question were all employees of Provost.

##### The true employer

In Nationair (Nolisair International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630), the Board examined the criteria it considers relevant in determining the identity of the true employer, i.e., the employer who exercises fundamental control over the employees in question. The Board states the following:

*"1. The Board will assess the factual situation but will not give decisive weight to agreements where they are not confirmed by the facts.*

*Thus, in our jurisdiction, significant weight cannot be given to the payment of wages. The Canada Labour Code speaks of an employee (employé) and makes no reference to remuneration in the definition of this term, contrary to the Quebec Labour Code, for example, which gives a salaried employee (salarie) freedom to associate. More significant will be the identification of the person who does the*

*paying, who ultimately bears the cost, and the impact this has on the employment relationship.*

*2. Another indicator will surely be the person who controls access to employment: the person who hires or who gives the work to be performed. Here, regard must be had to the selection process and the criteria used. The person who in fact has the power to approve the selection and influence it decisively is more akin to an employer than a mere occasional user. The lessee who retains or exercises a veto or the equivalent over the selection of personnel is certainly not extraneous to the employment relationship.*

*3. A third criterion concerns the actual establishment of working conditions. Who actually establishes working conditions? An agency that is merely a disguised employment office, a kind of clearing house with a title, could hardly be termed an employer. In this situation, it would merely be an agent acting on behalf of the employer, the equivalent of the personnel department of a company of which it is an integral part and whose wishes it carries out as an employee.*

*4. Another criterion concerns the actual performance of work. How is the work performed on a day-to-day basis? Who assigns the work? Who in fact determines and approves the standards governing the performance of work? In this regard, who has the last word, the final say? Is it the person who evaluates, who decides, who determines that an employee will work or be terminated because of his performance? What expertise does the agency have with respect to the work performed? What is the degree of similarity between the duties performed by regular employees and those performed by employees from outside?*

*5. Other criteria may also assist the Board in its determination: the employees' perception, their identification with the company, their degree of integration into the company, the fortuitous, temporary or permanent nature of their employment with the leasing company."*

*(pages 74-75; and 110-111)*

In the present case, the facts presented in evidence by the CEP have not persuaded the Board that Provost has been exercising fundamental control over the employees of the Quebec City depot following the conclusion of the franchise agreement transferring the operating rights for the Coop. Although the Coop carries on activities that are

closely related to those of Provost and that are largely controlled by it under this agreement, the Board is of the opinion that the Coop nevertheless possesses all the characteristics of an employer within the meaning of the Code.

The Coop, incorporated under the Cooperatives Act, has its own organization and its own management and supervisory personnel who enable it to establish a genuine employer-employee relationship with the employees in question. It is the Coop which, through the temporary committee, hired, assigned work to and paid the employees. Although, during the summer of 1994, Provost offered the employees of the Quebec City depot the option of resigning and joining the Coop or retaining their recall rights under the collective agreement, it played no part in the selection of the employees. In the case of training, albeit it must be given by Provost under the agreement, it is a feature peculiar to a franchise agreement that cannot be given decisive weight.

More importantly, control over discipline is the exclusive responsibility of the Coop, acting through its general manager, Mr. Yves Côté. Although the monitoring tools (tachograph and log book) are submitted to Provost's administrative centre in Anjou for billing purposes, the evidence showed that the Coop has final decision-making authority in disciplinary matters.

Provost played no part in determining the employees' working conditions. It was the Coop's provisional committee, drawing on the collective agreement concluded between Provost and the CEP, that developed an agreement to govern the working conditions of the employees employed in the new business under the franchise agreement.

With regard to the day-to-day performance of work, it is clear that the Coop must meet certain requirements to ensure that work is performed according to the quality standards established by Provost, the franchisor. However, it is the Coop, through its dispatcher and through Mr. Yves Côté, that is responsible for assigning work and the day-to-day application of occupational safety and health rules. Here too, the requirements imposed by Provost are features common to a franchise agreement, and

are not grounds to conclude that the Coop is not the real employer. This general supervision of the Coop's activities and the use of the name "Provost Cartage" and of its vehicles will, however, have significant weight when the time comes to examine the question of common control or direction of a business under section 35 of the Code. Thus, although it can be concluded that the operation of the business is common to both parties, the management of human resources is clearly the responsibility of the Coop.

For these reasons, the Board concludes that the Coop is the real employer, within the meaning of the Code, of the employees who work at the Quebec City depot.

### Single employer and sale of business

The Board has seldom had the opportunity to examine franchise agreements in the context of applications for a declaration of single employer and sale of business. The parties filed with the Board various articles on the subject. In his work La franchise au Québec, Jean H. Gagnon proposes the following definition of "franchising":

*"A long-term commercial and contractual relationship between two businesses that are separate legal entities, through which one of the businesses (called the "franchisor") grants the other business (called the "franchisee") the right to do business in a particular manner, developed and successfully tested previously by the franchisor, in a specified territory, in accordance with uniform and defined standards, and under one or more given trademarks or trade signs, for a limited duration, for a consideration. Moreover, through this agreement, the franchisor provides the franchisee with certain additional services relating in particular to the management of the affairs of the franchisee and the marketing of the franchisee's business and the franchisor undertakes to control the uniformity of the methods defined and to improve them constantly having regard to the needs of the market."*

(Jean H. Gagnon, La franchise au Québec, Éditions Wilson & Lafleur Martel Ltée, 1986, page 21; translation)

More specifically, in La nature juridique du contrat de franchise, author Paul-André Mathieu deals with four types of franchise agreements. The "operating system franchise" appears to correspond with the type of agreement concluded in the instant case between the respondents:

*"4. The operating system franchise*

*i) The single franchise*

*This form of franchise really involves the concession by the franchisor of an organization plan through which the franchisee undertakes to sell products or offer services, depending on the requirements and the method, and under the franchisor's trade sign."*

(Paul-André Mathieu, La nature juridique du contrat de franchise, Cowansville, Les Éditions Yvon Blais Inc., 1989, page 9; translation)

Nevertheless, as interesting as the characterization of such an agreement may be from the standpoint of the civil law, the Board has consistently refused to focus on the form of the transaction concluded between the parties in the context of labour relations, and in particular, with respect to the examination of the application of sections 35 and 44 of the Code. The Board is more interested in the substance of the relationship created by the agreement (British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108), pages 179; 249; and 341; Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402), pages 183-184; and 14,238; and Seaspan International Ltd. (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRB no. 190), pages 44; and 218).

Provost admits that there was a partial sale of its business to the Coop in respect of the activities of the Quebec City depot. The Board shares this view and will have more to say on the subject later. However, Provost's admission does not end the matter.

Although the legal effect of a declaration of a sale of business is to preserve the bargaining rights and bind the purchaser to the collective agreement concluded between the seller and the applicant union, it does not have the effect in the instant case of protecting the bargaining structure comprising all the establishments in Ontario and Quebec or of permitting collective bargaining with Provost. It is therefore in the applicant's interests to seek first a declaration of single employer because such a finding would clearly make it possible to shed light on a transaction that erodes the collective bargaining structure and removes the right to bargain with the entity that holds the real power to bargain.

The Board has the discretion, under section 35 of the Code, to declare that a number of employers constitute a single employer for the purposes of the Code. This section provides as follows:

*"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single work, undertaking or business."*

The following five criteria must first be met before the Board decides whether or not it will exercise its discretion to make a declaration of single employer under section 35 of the Code:

- "1. two or more enterprises, i.e., businesses,*
- 2. under federal jurisdiction,*
- 3. associated or related,*
- 4. of which at least two, but not necessarily all, are employers (Emde Trucking Ltd., supra),*
- 5. the said businesses being operated by employers having common direction or control over them."*

(Murray Hill Limousine Service Ltd. et al. (1988), 74 di 127 (CLRB no. 699), page 145)

In the instant case, it is clear that the first four criteria have been met. The Coop and Provost are both businesses under federal jurisdiction working in the transportation sector and are both employers within the meaning of the Code. In deciding that the Coop is the real employer of the employees working at the Quebec City depot, the Board has found that, for the purposes of section 35 of the Code, the criterion of two or more employers has been met. In addition, the activities of the Coop and of Provost are clearly associated or related, since the two businesses engage in the same type of activities, both under the same name, "Provost Cartage".

The difficulty in the instant case, as in many cases of this type, lies in the application of the final criterion, i.e., whether the Coop and Provost have common direction or control of the Quebec City depot. The Board addressed the question of what, in its opinion, constitutes "common control or direction" in The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60):

*"... A more decisive test is the extent of common direction or control. The Board does not require total commonality of control in that all the enterprises are controlled by the same group of individuals. There may very well be a breakdown of functions whereby different persons have different responsibilities and play different roles in each of the companies involved or possibly no role at all in one or more of the companies. If it is established, however, that the policies of the various enterprises are closely co-ordinated, integrated and subject to joint direction, even though the individuals are not directly tied to all of the companies involved, this would appear to show common direction and control."*

(pages 45; 359; and 441; emphasis added)

In the context of the franchise agreement concluded between the respondents, it is important to examine the relationship between Provost and the Coop as it pertains to

the operation of the Quebec City depot. In this regard, the decision in White Spot Limited and Gilley Restaurants Ltd., no. B191/95, May 25, 1995, rendered by the British Columbia Labour Relations Board in a franchising context, is highly relevant. In this decision, the British Columbia Board identifies certain questions to be examined when applying the test to determine whether there is common direction and control by the franchisor and the franchisee. Although these questions do not alter the fundamental nature of the test to be met as it is defined in The Canadian Press et al., supra, the Board finds them useful to the extent that they relate specifically to franchising. These questions are as follows:

*"In reviewing that decision and other common employer decisions decided by this Board we find the appropriate questions to ask in examining a franchise relationship in the context of common control or direction are as follows:*

- 1. Does the franchisor have input into how the franchisee operates either directly or indirectly?*
- 2. Does the franchisee have input either directly or indirectly into how the franchisor operates?*
- 3. What is the nature, if any, of the ongoing inter-corporate connection?*
- 4. Does the franchisor assist the franchisee in obtaining business?*
- 5. Does the business of the franchisee and franchisor operate interdependently or independently?*
- 6. Does the franchisor take an active role in how the franchisee operates its business?"*

(pages 26-27)

As stated above, the Board notes first that the Coop alone manages its human resources and the labour relations of its business. However, the Board is of the opinion that such is not the case as regards the management of the day-to-day activities of the Quebec

City depot which is managed jointly by Provost and the Coop. In the Board's opinion, this is the principal consideration when the time comes to examine the common direction or control criterion. Moreover, as the Board stated in Muir's Cartage Ltd. and Canada Post Corporation (1992), 89 di 12; 17 CLRBR (2d) 182; and 92 CLLC 16,060 (CLRBR no. 955), pages 37; 205; and 14,479, there must be common direction and control of the business and not of the employees or the persons.

In the present case, the Coop is subject to a high degree of control by Provost of the activities of the Quebec City depot. While there is no need to repeat all the facts, it is appropriate to review some of them.

The Coop is required to operate the business under the name "Provost Cartage" and to identify itself in all respects by the name and colours of "Provost Cartage". It uses equipment supplied by Provost, and the cleaning of the tanker trailers used by the Coop continues to be done according to the same quality standards.

Besides the fact that Provost is responsible for advertising and for training the Coop's employees, it can dispatch at any time during business hours one of its representatives to ensure compliance with the quality standards associated with the name "Provost Cartage". Moreover, the Coop cannot change the site of its operations without Provost's consent.

Provost also exercises significant control over the Coop's clientele and the setting of rates. Through the sales representative it employs, Provost solicits the Coop's clientele and negotiates with it, and controls the transportation rates established in consultation with the Coop. Needless to say, the setting of rates impacts significantly on the Coop's gross revenues and, hence, on its profit margin. Moreover, Provost is responsible for collecting accounts and generally absorbs losses where a Coop's customer defaults.

Finally, without Provost's consent, the Coop cannot carry on any other commercial activity within its territory.

The respondents argued that the status of "*independent contractor*" conferred on the Coop confirms that it alone operates its business. The Board cannot accept this argument. Although this clause prevents the Coop from binding Provost in civil and commercial matters, it does not alter in fact and in a labour relations sense the nature of the operational relationship between the respondents.

In the light of these facts, the Board is satisfied that the criterion of common control or direction has been met.

This finding now leads the Board to examine the labour relations purpose that would be served were it to decide to make a declaration of single employer in the instant case.

Generally speaking, the Board has long recognized that the exercise of its discretion under section 35 must serve to protect and preserve existing bargaining rights, and to continue and facilitate the rationalization of collective bargaining structures conducive to establishing industrial peace (Air Canada et al. (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRB no. 771); British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. (1979), 38 di 205 (CLRB no. 225)). In a very recent decision, the Board clarified the scope of this policy in these words:

*"The Board's foremost consideration, when dealing with section 35 applications, must remain that of ensuring that the employer does not use the section to deny or erode bargaining rights. However, where existing bargaining unit structures are in place, and bargaining rights will clearly survive regardless of the Board's determination, the labour relations purpose which justifies a section 35 declaration need not be remedial alone. Although the rationalization of bargaining structures may not be the primary aim of section 35, to the extent it relates directly to the structuring of the*

*collective bargaining relationship, it cannot be said that it does not constitute a legitimate labour relations purpose."*

(Prince Rupert Grain Ltd. et al. (1996), as yet unreported CLRB decision no. 1155, page 26)

In the present case, there is no doubt that a declaration of single employer would protect the CEP's bargaining rights vis-à-vis the employees of the Quebec City depot, rights that it lost as a result of the franchise agreement, and maintain in force for these employees the collective agreement concluded between Provost and the CEP. However, there is no need to use such a declaration to achieve this end. This purpose can be served by a declaration of sale of business under section 44 of the Code.

The purpose served by a declaration of single employer, which purpose, in the Board's opinion, fully justifies the exercise of its discretion in the instant case, concerns the right of the CEP to continue bargaining, through the established collective bargaining structure, with the two corporate entities that have common control over the operations of the Quebec City depot.

Anti-union animus on the part of the employer need not be present for the Board to exercise its discretion in order to restore a bargaining structure eroded by a commercial transaction.

In the instant case, it was established that Provost continues to exercise real control over the business (in particular with respect to revenues and profit margin) and this unquestionably affects the manoeuvring room left to the Coop in the event of face-to-face bargaining with a union. In truth, the significant control exercised by Provost over the business means that even if the Coop alone were to negotiate with the CEP, Provost would still have a significant presence at the bargaining table because of its considerable influence. By bargaining directly with Provost, the applicant could then require Provost, which exercises significant control over the affairs of the business, to bargain in good faith and experience the economic sanctions that are permissible

in a period of bargaining. Thus, to make bargaining effective, the applicant will deal directly with the party that has the real power to increase the Coop's revenues or reduce the annual fees to permit pay increases or other benefits sought.

Finally, preserving the bargaining structure will enable the employees to remain part of the same unit and to be governed by the same collective agreement as that which governs their counterparts at other Provost establishments in Quebec and Ontario, with all the rights associated therewith.

For these reasons, the Board decides to exercise its discretion to make a declaration of single employer; hence its decision not to consider the subsidiary application for a declaration of sale of business for the reasons stated above.

Under the powers conferred on it, the Board:

- (1) declares that Provost and the Coop constitute a single employer within the meaning of section 35 for all purposes of the Canada Labour Code;
- (2) declares that the CEP continues to be the bargaining agent of the Coop's employees;
- (3) declares that Provost and the Coop are bound by the collective agreement negotiated between Provost and the CEP and by all the grievances filed under the said collective agreement;
- (4) orders the respondents to observe and comply with the collective agreement, including seniority rights and the layoff procedure.

Any question concerning the administration or contravention of the collective agreement and any request for compensation relating to non-recognition of the rights provided in the collective agreement shall be determined by an arbitrator acting pursuant to the said collective agreement.

### **Complaint of unfair labour practice**

The applicant alleges that Provost contravened subsection 94(3) and section 96 of the Code by laying off the above-named 13 employees, further to the franchise agreement concluded between the respondents.

The Board duly noted the circumstances of these layoffs and took them into account in assessing all the applications and, in particular, in arriving at its decision to allow the application for a declaration of single employer. However, the Board has decided to refuse to hear the complaint pursuant to subsection 98(3) of the Code.

In the Board's opinion, determining whether there was anti-union animus on the part of the employer will not serve any labour relations purposes in the circumstances of the present case. In fact, in light of the declaration of single employer made by the Board, the remedies sought by the applicant in respect of the complaint could be decided by an arbitrator under the provisions of the collective agreement that, according to the Board's order, both Provost and the Coop must continue to observe.

According to the evidence, grievances to challenge these layoffs and seek the reinstatement and compensation for lost pay and benefits of the employees affected have been filed, in keeping with the procedure provided in the collective agreement. Indeed, these conclusions are the same as those being sought in the complaint filed with the Board. The Board believes that this dispute essentially concerns the application, administration and interpretation of the collective agreement. These applications can therefore be dealt with by the tribunal responsible for interpreting the collective agreement as it contains the relevant provisions dealing with the lay-off procedure and the seniority list.

## Lockout

Finally, the Board must consider the application for a declaration of unlawful lockout under section 92 of the Code and the application for consent to institute a prosecution under sections 100 and 104 of the Code. To this end, the Board must determine whether, through its actions, the employer declared a lockout within the meaning of the Code. Subsection 3(1) defines a lockout as follows:

*"lock-out" includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of his employees, done to compel his employees, or to aid another employer to compel his employees, to agree to terms or conditions of employment."*

(emphasis added)

The three elements of an unlawful lockout were described in Murray Hill Limousine Services Ltd. (1986), 66 di 171 (CLRB no. 582):

*"(1) the shutdown of a work place, the suspension of work or the refusal by an employer to continue to employ a certain number of its employees,*

*(2) while the conditions provided in section 180 [now section 89] have not been met,*

*(3) in order to force employees of the employer (or of another employer) to accept the working conditions."*

(page 195)

Before the Board can declare that there was an unlawful lockout, the applicant must establish that there is an element of intent associated with the pursuit of concessions. This element is normally assessed from a set of circumstances from which can be identified the employer's intent in its conduct with the union and the employees.

The first two elements appear to be present in the instant case. No one denies in fact that the layoffs that Provost announced to the employees of the Quebec City depot and that took effect on September 3, 1994 constituted either a suspension of work or a refusal to continue to employ a certain number of these employees. It is the third element, i.e., the element of intent, that is, in the circumstances of the present case, problematic.

The Board notes first that the depot's difficult financial situation was too real to be considered merely a pretext on the part of the employer to obtain concessions from the union. Moreover, the CEP and Provost were not bargaining to renew the collective agreement at the time of the events in question. In addition, the evidence clearly established that the economic situation of the Quebec City depot was steadily worsening. The union was also aware of this fact and a few months earlier had itself made certain concessions to alleviate the depot's difficult financial situation. This situation had not improved since as the evidence reveals. In short, the context in which the element of intent should be assessed is one that takes into account the economic difficulties that the company was experiencing with respect to the activities of this depot.

Thus, when the president of Provost informed the union in March 1994 of his intention to close the depot, the union did not question the seriousness of the situation. It merely indicated that it would wait and see what the cooperative concept proposed by Richard Messier would entail before taking a position. This initial reaction by the union immediately rules out the possibility that the union viewed this initiative as nothing more than a tactic by the employer to further water down working conditions.

The subsequent meetings between the union and Provost's officers confirm this analysis because the union asked them at these meetings to explore other avenues, including the creation of a satellite depot modelled on Buckingham or Valleyfield. Mr. Provost then replied that conditions in Quebec City were far too different to adopt this solution. This fact is important because it shows that, throughout these events, the

parties were aware of the seriousness of the situation, even though they proposed different solutions. None of the parties considered reopening of the collective agreement as an alternative to the closing.

The statement by Provost's president, during his testimony, that, in his view, the formation of the cooperative was not incompatible with the unionization of its employees should be assessed in this same context. The president's view in this regard was shared by Mr. Richard Messier, the consultant hired by Provost to implement this project. Mr. Messier, it should be recalled, had indicated at the general meeting of employees on March 13, 1994 that unionization contributed to the success of employee cooperatives. Nothing in all the testimony given by the employees of Provost casts doubt on the president's view in this regard and on the possible role that the union could have played in the cooperative, had it wished to do so. The Board wishes to point out that its purpose, in recalling this fact, is not to question the union's decision not to become involved in the cooperative, but merely to assess the subjective element of pressure exerted by the employer on the union.

The Board concludes from this whole analysis of all the circumstances of the present case that the applicant did not succeed in proving that the decision to close the Quebec City depot was taken by the employer to compel its employees to agree to terms and conditions of employment according to the definition in the Code. Certainly this element of intent, like the element of concerted action by employees in the case of an unlawful strike, is often difficult to prove directly. In the present case, however, the circumstances reveal that the business was facing a particularly difficult financial situation and that the decision to close the depot was in fact going to be made even if the depot's employees had not displayed any interest in forming a cooperative. Moreover, there is no doubt that, of all the options, Provost's president clearly favoured the franchise and cooperative option. However, it was not proved that his intent in doing so was to compel the employees to agree to new terms and conditions of employment. The facts of the instant case and the testimony heard reveal that the difficult economic situation of the Quebec City depot determined the unfolding of

events, and not a specific intent on the employer's part to exert pressure when it transferred the operating rights for the Quebec City depot.

Consequently, the application for a declaration of unlawful lockout is dismissed, and the Board refuses to give the applicant its consent to institute a prosecution under sections 100 and 104 of the Code.

## V. CONCLUSION

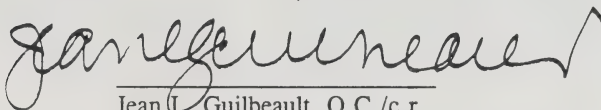
For these reasons, the Board allows the application for a declaration of single employer, declares that the CEP continues to be the bargaining agent of the Coop's employees, declares that Provost and the Coop are bound by the collective agreement negotiated between Provost and the CEP and by all the grievances filed under the said collective agreement, and orders the respondents to observe and comply with the collective agreement, including seniority rights and the lay-off procedure. Any question concerning the administration or contravention of the collective agreement and any specific request for compensation relating to non-recognition of the rights provided in the collective agreement shall be determined by an arbitrator acting pursuant to the said collective agreement.

Given the present circumstances and the declaration of single employer, the Board exercises its discretion to refuse to hear the complaint of unfair labour practice under subsection 98(3) because the remedies sought in this regard can be dealt with by an arbitrator under the provisions of the collective agreement which the Board has declared that both Provost and the Coop must continue to observe.

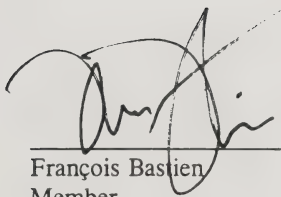
Finally, the Board dismisses the application for a declaration of unlawful lockout made pursuant to section 92 of the Code and refuses to give the applicant its consent to institute a prosecution under sections 100 and 104 of the Code.

The Board designates Mr. Jean Gosselin, the Board's senior labour relations officer, to assist the parties, if necessary, in implementing the Board's decision.

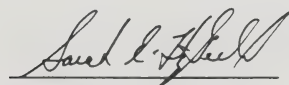
This is a unanimous decision of the Board.



Jean L. Guilbeault, Q.C./c.r.  
Vice-Chairman



François Bastien  
Member



Sarah E. FitzGerald  
Member



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## Summary

Public Service Alliance of Canada, on behalf of Alain Bernard, *complainant*, and Raven Recycling Society and Len Slann, *respondents*.

Board File: 745-5063  
CLRB/CCRT Decision no. 1171  
July 11, 1996

## Résumé

Alliance de la Fonction publique du Canada, au nom d'Alain Bernard, *plaignant*, ainsi que Raven Recycling Society et Len Slann, *intimés*.

Dossier du Conseil: 745-5063  
CLRB/CCRT Décision n° 1171  
le 11 juillet 1996

A complaint was filed on behalf of Alain Bernard alleging that his employer discharged him contrary to the Canada Labour Code because he was proposing to become a member of a trade union, and because he was attempting to persuade other employees to become members of a trade union. Mr. Bernard was terminated at the time a union organizing campaign was in progress.

No evidence adduced led the Board to believe there was a cloud of anti-union animus over the workplace. No employees said they felt intimidated by the employer during the union organizing drive, and there was no evidence regarding a "chilling effect" towards the union. As well, those employees actively involved in the organizing campaign were not fired or disciplined.

There was no evidence in the present case, circumstantial or otherwise, to lead the Board to conclude the complainant was terminated contrary to the Code.

Une plainte a été déposée au nom d'Alain Bernard, alléguant que l'employeur avait congédié ce dernier en violation du Code canadien du travail parce que celui-ci se proposait de devenir membre d'un syndicat et tentait de convaincre d'autres employés de faire de même. M. Bernard a été congédié au cours d'une campagne de syndicalisation.

Aucune preuve produite n'a amené le Conseil à croire qu'il existait un sentiment antisyndical dans le lieu de travail. Aucun des employés n'a déclaré qu'il s'était senti intimidé par l'employeur pendant la campagne de syndicalisation. En outre, il n'y avait pas de preuve «d'effet dissuasif» à l'égard du syndicat. De plus, l'employeur n'a pas congédié les employés qui participaient activement à la campagne de syndicalisation et ne leur a pas imposé de mesures disciplinaires.

Il n'y a pas, en l'espèce, de preuve circonstancielle ou autre qui amènerait le Conseil à conclure que le plaignant a été congédié en violation du Code.



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LES MOTIFS DE DÉCISION DU CCRT SONT  
MAINTENANT ACCESSIBLES DANS QUICKLAW.

## Reasons for decision

Public Service Alliance of Canada, on behalf of  
Alain Bernard,

*complainants,*

*and*

Raven Recycling Society and Len Slann,

*respondents.*

Board File: 745-5063  
CLRB/CCRT Decision no. 1171  
July 11, 1996

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Messrs. Calvin B. Davis and Patrick H. Shafer, Members. A hearing was held on March 26, 27 and 28, 1996 in Whitehorse, Yukon.

### Appearances

Ms. Monica M. Leask, counsel, for the respondents; and

Mr. Alain Bernard, complainant, represented by Mr. Michael Miller, Yukon Employees' Union.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

On April 20th, 1995, the Public Service Alliance of Canada (PSAC) filed a complaint on behalf of Alain Bernard, alleging that Raven Recycling Society (the Society) had violated sections 94(1)(a), 94(3)(a)(i) and 94(3)(e) of the Canada Labour Code (Part I - Industrial Relations).

The complainants maintained that Mr. Bernard was discharged because he was, or was proposing to become, a member of a trade union and because he was attempting to persuade other employees to become members of a trade union.

As well, the union alleged that the employer's actions interfered with the formation of a trade union and the representation of employees when it discharged a union supporter. It also alleged that the employer sought by intimidation, threat of dismissal, and other means to compel persons to refrain from becoming or to cease to be a member of a trade union.

At the outset of the hearing, the parties advised the Board that the termination of Mr. Bernard was the only complaint they had not resolved.

## I

The Society is a non-profit organization operating as a recycling centre in Whitehorse, Yukon. Its mandate includes providing employment for mentally challenged adults, and persons involved in the correction system, as well as others. The Society's board of directors is made up of volunteers. Some of these volunteers belong to unions such as the Professional Institute of the Public Service (PIPS), PSAC and the Yukon Government Employees Union. The Society's day-to-day operations are run by a full-time executive director. There are approximately 12 full-time employees on staff as well as 4 summer seasonal workers.

Mr. Bernard began work with the Society on a volunteer and casual basis in September 1994. He enquired about full-time work but there were no positions available. He requested a six-month training program with the Society to be funded by the Canadian Jobs Strategy.

Mr. Slann, the Society's executive director, spoke with Mr. Bernard regarding the training program. Mr. Bernard told him he had a business degree including a course in accounting and was familiar with computer software programs.

Mr. Slann decided to hire Mr. Bernard. His job would encompass various aspects of the Society's administrative and warehouse operations, with particular emphasis on

bookkeeping and financial matters. Mr. Slann soon came to the conclusion that Mr. Bernard knew very little about accounting and computer programs. As a result, Mr. Bernard assumed more duties in the warehouse.

Problems began after Mr. Bernard's first week of employment. Mr. Bernard did not seem happy or motivated and became less cooperative. When Mr. Slann asked him what was wrong, he said he was not well received in the warehouse. Mr. Bernard felt he was getting less desirable jobs while other employees did the "cool jobs." There also appeared to be resentment because he worked in the office. Mr. Slann felt this was because of the "new boy syndrome." He explained that it was common practice for new employees to get jobs that were less desirable.

Messrs. Slann and Bernard discussed inefficiencies in the work place. Mr. Bernard felt that not only were some of the work practices inefficient, but so were some of the employees. He expressed these views to Mr. Slann and stated that he had a number of ideas about how to address the situation. He said he would organize his ideas and draft a report.

According to Mr. Bernard, the Society would operate more efficiently if it became a "collective" or co-operative. This would ensure that everyone earned a decent and equitable wage. Moreover, management decisions would be made by all employees.

The executive director, various employees, as well as members of the Society's board of directors were approached about the idea. Mr. Bernard was allowed to put his proposal forward. While presenting his plan at a staff meeting, he told the employees a union would not work. He felt his plan was far superior to having a union in the work place. No one appeared to be overly enthused about his concept, nor prepared to seriously consider it.

About this time, Mr. Bernard started making verbal and written allegations about certain employees. He complained about or criticized virtually every employee. An

investigation revealed that the allegations were either unfounded or the incidents were grossly exaggerated.

Mr. Slann was becoming quite dissatisfied with Mr. Bernard. This was especially so when he began criticizing management and in particular Mr. Slann. In the first week of February, 1995, Mr. Slann approached Mr. Bernard and told him if he did not change his attitude, his training contract would be terminated. On February 9th, he spoke to Ms. Diane Lammer, the Society's education co-ordinator, about dismissing Mr. Bernard. Ms. Lammer was of the view he should not do so at that time.

At the end of January, Mr. Slann called representatives of the job strategies program to discuss the possibility of cancelling the training program. One of the representatives considered that Mr. Bernard should be fired while another suggested he wait. Mr. Slann also spoke to the president of the Society regarding his problems with Mr. Bernard.

On or about February 13th, Mr. Slann was approached by Mr. James Wery, an employee of the Society. Mr. Wery explained that he had hosted a meeting of employees at his house to discuss their employment situation. According to Mr. Wery, Mr. Bernard once again put forward his concept of a co-operative. Mr. Bernard apparently also told the employees that the executive director wanted to fire them all.

Mr. Wery told Mr. Slann about Mr. Bernard's remarks because he feared that some of the mentally challenged employees might believe Mr. Bernard when he said that Mr. Slann wanted them fired. He also expressed his displeasure with Mr. Bernard's allegation that he was not doing his job in a timely fashion. Mr. Wery believed that Mr. Bernard was attempting to set him up.

Following the conversation with Mr. Wery and because of his dissatisfaction with Mr. Bernard, Mr. Slann decided to terminate him. He would have terminated him on

February 16th, but Mr. Bernard was away on paternity leave. The complainant was therefore dismissed on his return to work on February 23rd, 1995.

Upon presenting Mr. Bernard with his letter of termination, Mr. Slann discussed the reasons for his termination. He told Mr. Bernard that he knew the complainant had approached some workers to obtain support for his organization scheme, and that he was trying to reorganize the work place.

According to Mr. Slann, he did not have the slightest idea there was any talk of a union, nor did he tell Mr. Bernard he was being terminated for organizing the employees into a union. The issue of unionization was never discussed or raised during Mr. Bernard's employment or at the time of his dismissal.

Mr. Bernard testified that when he started working at the Society, he considered that he and Mr. Slann were friends. They discussed inefficiencies in the work place as well as those of the employees. Mr. Slann told him he would fire them "all" if it were not for personnel policy. Mr. Bernard said that in speaking with Mr. Slann, the topic of trade unions came up on several occasions. He was totally pro union while Mr. Slann had concerns with trade unions. The conversations usually ended on a diplomatic note.

Mr. Scott Gauthier, who was attempting to organize the union, visited Mr. Bernard at his home. During their conversation, Mr. Gauthier stated that he did not know much about unions. Mr. Bernard believed that Mr. Gauthier had left him in charge of the organizing drive.

Mr. Bernard attended the meeting at Mr. Wery's home on February 10th, 1995. According to Mr. Bernard, all the employees who were present unloaded their frustrations about the work place. When a discussion concerning unions took place, he told the group that he had had a bad experience with unions. He felt that the

Society was too small to unionize, but still wanted to find out specific information before discarding the idea of joining a union.

In the meantime, on February 10th, Mr. Bernard called union representatives to discuss the union. He and a union representative were to meet on February 13th. However, Mr. Bernard cancelled the meeting. He testified that he had other things to do, and when he finished, his hands were greasy. He did not schedule another meeting at that time.

On February 23rd, Mr. Bernard was called to Mr. Slann's office and received his letter of termination. He went over the contents with Mr. Slann. What Mr. Bernard remembered most about the meeting was that Mr. Slann laughed as he accused him of trying to organize the workers. The following day, Mr. Bernard went to see the union representative. He was told to obtain the union cards that were already signed. When he went to see Mr. Gauthier to get the cards, Mr. Gauthier said he would think about it and talk to the other workers first. Another worker later told Mr. Bernard that the cards were destroyed because the workers were afraid.

Following his termination, Mr. Bernard signed a union card and left it at the union office. He never paid any fees. He testified that by signing the card he wanted to show that he was serious about his support for the union.

## II

The onus on the employer is not necessarily to demonstrate that it had just cause to dismiss Mr. Bernard, but that its actions were not tainted with any anti-union animus. The Board's policy is summarized in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600), as follows:

*"The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision*

*by an employer to take any of the actions prescribed in section 184(3)(a) [now 94(3)(a)] against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:*

*'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) [now 8(1)]. To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3) [now 94(3)], he will be found to have committed an unfair labour practice.'*

*(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461)"*

*(pages 34-35; and 14,007)*

### III

In the present circumstances, there are some obvious coincidences that raise suspicions about the motives for dismissing the complainant. There is no doubt that at the time of Mr. Bernard's termination, the employees of the Society were considering joining a union and that a union organizing drive was in progress. A termination at the time of an organization drive is often a sufficient basis for a determination that anti-union animus was a reason for the dismissal. However, the Board, in the instant case, is unable to make such a determination in light of the evidence presented before it.

The complaint filed by Mr. Bernard and the union states that Mr. Bernard was a union organizer, as he had taken a leading role at the February 10th meeting in advocating a union. From the evidence, it is clear to the Board that Mr. Bernard was not a union organizer, nor had he assumed a leading role in the organizing drive. In his own evidence, he clearly stated he never encouraged unionization during the February 10th employee meeting. If anything, he had doubts about unionization and only chose to become a union member after being fired.

This does not mean that an employee must be a union member or organizer to be terminated for anti-union reasons. The Board may well find that an employee has been dismissed contrary to the Code even though he or she was not actively involved with the union. What is determinative is whether or not anti-union animus played a part in the employer's decision to terminate the employee concerned. If anti-union animus is involved in any way, even if it is an incidental reason for the dismissal, the actions of the employer will be found to have violated the Code. Consequently, where an organization drive is involved, to discharge its burden of proof, the employer must satisfy the Board that this activity was not a proximate cause for termination.

In this particular case, did Mr. Slann use Mr. Bernard's past failings as a pretext to terminate him because of the organizing drive?

The Board heard evidence from one of the employees that "everybody" knew about the organizing drive around the time Mr. Bernard was terminated. However, no further evidence was brought with respect to the question of whether Mr. Slann was one of those who knew about the union organizing drive.

The union had the opportunity to cross-examine the employer's witnesses which included employees and members of the Society's board of directors. There was no evidence adduced which led the Board to believe there was a cloud of anti-union animus over the work place. No employees said they felt intimidated by the employer

during the union organizing drive, and there was no evidence regarding any anti-union activity by the employer. The termination did not leave a "chilling effect" on the employees toward the union. As well those employees actively involved in the organizing campaign were not fired or disciplined. Furthermore, a subsequent meeting was held between the union and employees with the employer's knowledge.

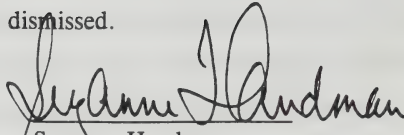
The Board is cognizant of Mr. Bernard's allegation that he was told by Mr. Slann that he was being terminated for attempting to organize the workers. The Board feels that if this statement was actually made, it was made by Mr. Slann with respect to Mr. Bernard's desire to transform the work place into a co-operative.

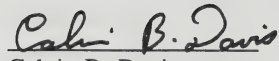
Indeed, Mr. Bernard's actions lead the Board to conclude that at the time of his termination, he did not consider he had been terminated for union activity. When he appeared before the Society's Personnel Committee to appeal his firing, he never raised the issue of union activity nor did he tell them about Mr. Slann's alleged comments to him about unions.

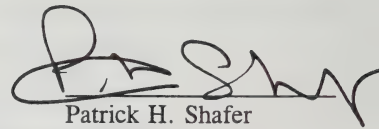
If Mr. Bernard, in supporting a co-operative, was in reality supporting unionization, then the Board would consider that a violation of the Code occurred. Irrespective of whether an organization is called a co-operative or a union, if it is in fact a trade union, both the organization and its members will receive the protection foreseen by the Code. However, in this instance, there is no doubt that both Mr. Slann and Mr. Bernard clearly understood that the complainant was trying to form a co-operative and not a union. The Board is of the same view and concludes that Mr. Bernard was not in reality supporting unionization.

In sum, there was no evidence in the present case, circumstantial or otherwise, to lead the Board to conclude that Mr. Bernard was terminated contrary to the Code.

The complaint is therefore dismissed.

  
Suzanne Handman  
Vice-Chair

  
Calvin B. Davis  
Member

  
Patrick H. Shafer  
Member

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## Summary

Michel Tailleux, *complainant*, Canadian Union of Public Employees, *respondent*, and Bunge du Canada Ltée, *employer*.

Board File: 745-4752  
CCRT/CLRB Decision no. 1172  
July 10, 1996

This case deals with a complaint alleging that the Canadian Union of Public Employees breached its duty of fair representation provided for in section 37 of the Canada Labour Code. The complainant criticized the union for changing its day-to-day dispatch rules, thereby affecting his seniority rights, and for not giving him the opportunity to reapply for the position of checker. Before the change, the dispatch rules favoured the complainant, causing a lot of discontent and uncertainty among the employees.

The majority of the panel found that the union's decision to amend the dispatch procedure, and subsequently not to grant the complainant's grievance concerning the position of checker, was not tainted by arbitrariness, discrimination or bad faith within the meaning of section 37. That decision resulted from the exercise of its judgement with respect to the primacy of collective interests over individual ones; it was reached in a reasonable manner taking into account genuine factors.

## Résumé

Michel Tailleux, *plaignant*, Syndicat canadien de la Fonction publique, *intimé*, et Bunge du Canada Ltée, *employeur*.

Dossier du Conseil: 745-4752  
CCRT/CLRB Décision n° 1172  
le 10 juillet 1996

Il s'agit d'une plainte alléguant que le Syndicat canadien de la Fonction publique a manqué à son devoir de représentation juste prévu à l'article 37 du Code canadien du travail. Le plaignant reproche au syndicat d'avoir changé les règles de déploiement journalier, ce qui a eu pour effet d'affecter ses droits d'ancienneté, sans lui avoir donné la possibilité de postuler à nouveau pour le poste de peseur. Avant le changement, ces règles de déploiement donnaient lieu à beaucoup de mécontentement et d'incertitude au sein des employés et s'exerçaient surtout à l'avantage du plaignant.

La majorité du banc juge que la décision du syndicat de modifier la procédure de déploiement, et par la suite de ne pas faire droit au grief du plaignant demandant de rouvrir le poste de peseur, n'est pas entachée d'arbitraire, de discrimination ou de mauvaise foi au sens de l'article 37. Elle découle plutôt de l'exercice de son jugement quant à la primauté de l'intérêt collectif sur l'intérêt individuel. Cette décision a été prise de façon raisonnable en tenant compte des facteurs véritables.

According to the Vice-Chair's dissenting opinion, the argument concerning the collective interest is biased. He believed that this was a case where the majority wanted to deny the minority's rights, an initiative that the president favoured for obvious political reasons. He found that by refusing to meet its obligations regarding the duty of fair representation that is "genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee," the union had violated section 37 of the Code

Selon l'opinion dissidente du Vice-président, l'argument de l'intérêt de la collectivité est biaisé. Il s'agit plutôt de l'intérêt d'une majorité à nier les droits d'une minorité, une mesure que le président du syndicat favorisait pour des raisons électoralistes évidentes. Il estime que le syndicat a violé l'article 37 du Code pour avoir refusé de remplir les obligations liées au devoir de représentation juste, «réelle et non seulement apparente, faite avec intégrité et compétence, sans négligence grave ou majeure, et sans hostilité envers le salarié».

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LES MOTIFS DE DÉCISION DU CCRT SONT  
MAINTENANT ACCESSIBLES DANS QUICKLAW.

## Reasons for decision

Michel Tailleux,

*complainant,*

*and*

Canadian Union of Public Employees,

*respondent,*

*and*

Bunge of Canada Ltd.,

*employer.*

Board File: 745-4752

CCRT/CLRB Decision no. 1172

July 10, 1996

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The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, and Mr. François Bastien and Ms. Véronique L. Marleau, Members. A hearing took place in Québec on November 1 and 2, 1994.

### Appearances

Mr. Jean Riou, for the complainant;

Mr. Sylvain Seney, assisted by Mr. Adrien Langlais, president of the respondent union; and

Mr. Conrad Desnoyers, administrative assistant of the employer.

The reasons for decision of the majority were written by Mr. François Bastien, Member. The dissenting opinion of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, is attached.

I

The Complaint

The complainant alleged that the Canadian Union of Public Employees had breached its duty of fair representation under section 37 of the Canada Labour Code by refusing to process his grievance. He claimed that the effect of his grievance, if allowed, would have been to reopen the competition for the position of weigher for which he could have applied. He had not applied for the position when it was first posted because the daily dispatching rules in force at the time allowed him in fact to perform the duties of this position frequently. In the meantime, the union had negotiated new rules that no longer allowed the complainant to perform these duties.

II

The Relevant Facts

The complainant, Michel Tailleux, is an employee of Bunge Canada Ltd. with considerable seniority. He occupied various positions in the port of Quebec. At the time of the events that gave rise to the present complaint, he was working as a marine tower operator assigned to the unloading of wheat barges.

The present dispute originates from the daily dispatching procedure in effect since 1989. Based on general seniority, these daily dispatching rules referred essentially to a distinction between the work of loading and unloading ships or barges, on the one hand, and all remaining work on the other. Of the latter work category was the loading and unloading of grain transported by railway cars or trucks, the transfer of grain from one elevator to another, heavy equipment operations and the cleaning of facilities; for work falling under the former category, the daily dispatching or redispatching system was based on the position or classification of each worker. For example, when a marine tower operator was away on annual or sick leave, he was

replaced by someone who held a primary classification. Where someone who held this classification was not available, a worker who held a secondary classification replaced him. Seniority was used only to decide who, among a number of workers also qualified to fill the position in question, would be assigned.

Conversely, dispatching in all other cases was based on general seniority. For example, when there were no ships to load or unload, a senior employee could bump, at any time of the day, a junior employee who then had to be reassigned other duties considered in most cases to be less interesting. When the company introduced this policy in 1989, it posed relatively few problems because the volume of grain shipped remained high and cases where an employee had to be redispached fewer. Adrien Langlais, union president, pointed out that problems began appearing in 1991, and became greatly accentuated in 1993 by sharp declines in the volume of grain that Bunge was shipping at that time from the port of Québec.

This particular business climate and the daily dispatching procedure in effect at that time help to explain the decision faced by the complainant when the employer posted the position of weigher in February 1993. Mr. Tailleux explained to the Board that he had decided initially to apply, but had changed his mind the next day because, had he won the competition, he could not have been assigned to winnowing, since these two operations were performed simultaneously.

Winnowing was a new function that does not appear in the list of positions contained in the collective agreement signed on September 25, 1992. It should be noted that winnowing is done between January and April, when there is no navigation. During this period, the complainant was not occupying his marine tower operator position. Moreover, by continuing to work as a marine tower operator, his general seniority still entitled him to bump the incumbent of the position of weigher. Based on this logic, the complainant decided in the end not to apply for the position of weigher.

Another Bunge employee, Mr. Brousseau, obtained the position at the completion of the posting procedure.

According to the testimony heard, many members of the bargaining unit were very unhappy with this bumping situation, most notably junior employees who were frequently bumped by the complainant. An administrative assistant of Bunge, Conrad Desnoyers, testified that this situation caused problems in terms of the work atmosphere. His testimony was corroborated by a Bunge foreman, Carol Rancourt. Pressure was therefore brought to bear on the union by its members to have the dispatching system changed. The complainant admitted that he began hearing rumours to this effect in May 1993. He immediately made his position known to the union president, Mr. Langlais: he was not opposed to the proposed change; however, if it were introduced, he then would have to be allowed to apply again for the position of weigher occupied by Mr. Brousseau. The conversation was brief because, according to the complainant, they did not get along very well.

For his part, Mr. Langlais testified that the majority of members were very unhappy with the dispatching procedure, and that there was a need for the union to act and to find a solution to the problem. When he informed Mr. J.-G. St-Onge, company president, and Mr. Desnoyers, administrative assistant, of the situation, he was given to understand that there would be no objection to procedural changes provided they did not affect productivity. Mr. Langlais developed a proposal to change the dispatching system whereby the rule would to dispatch by position not general seniority as had previously been the case. In other words, there would no longer be a distinction between the work of loading and unloading ships, which was subject to dispatching by position, and the rest of the work.

Mr. Langlais first brought this proposal to the attention of the members on October 12, 1994 by circulating a petition. He collected the signatures of the vast majority of the 39 members of the unit in question between October 12 and 27. In each case, he

gave the potential signatories information and obtained their signature. Most members of the unit signed the petition immediately; a few initially refused, then changed their mind, without any urging from Mr. Langlais in the meantime.

The complainant was not contacted, and did not sign the petition; however, he was aware of "what was coming". A few days earlier, on October 8, 1994, the complainant informed Mr. Langlais during a brief meeting in the work place that he would not accept any changes to the existing procedure unless he were allowed to re-apply for the position of weigher. This is essentially the same position that Mr. Tailleur took during the conversations he had with Mr. Richard Paradis, the union adviser, in the fall of 1993. Mr. Paradis explained to him at the time that the decision to reopen the competition was up to the membership and the employer, as a change to the collective agreement was involved. He also added that this approach would create another problem: what would become of Mr. Brousseau, the incumbent of the position of weigher.

The complainant also informed Mr. Langlais, at the meeting of October 8, that if the competition were not reopened, he intended to file a complaint with this Board. According to his testimony, relations with his fellow workers, who appeared to be acting together to isolate him, took a turn for the worse the following day. What Mr. Langlais remembered of this conversation was that the complainant was perfectly aware of the union's intention at the time to change the daily redispaching procedure so that it could be done by position, not by general seniority.

Following the petition and on the strength of the support he had obtained from his members, the union president submitted his proposal to the employer at a meeting held on January 5, 1994. Further to this meeting, the proposal was redrafted, then formally accepted by the employer on January 10, 1994 in the form of a memorandum of understanding. A general meeting of the union was then held on January 28 at

which the proposal was presented and approved by a vote of 22 to 2, the complainant being one of the two members voting against it.

The complainant, who attended this ratification meeting, had the opportunity to speak prior to the vote. He took part in the deliberations of the meeting by reading a letter in which he complained that his seniority rights were being infringed upon and that the union's action, insofar as he was practically the only one to bear its brunt, constituted discrimination. He cited in this regard section 37 which, according to him, allowed the union to amend the collective agreement, even if certain employees may be harmed, provided that, in making these changes, the union does not act in an arbitrary or discriminatory manner or in bad faith. Moreover, if the complainant was free to read this letter at the meeting, there is no doubt that his remarks received a hostile reception and that he was told so resoundingly. According to the complainant, no discussion of the proposal took place; the meeting merely took note of the document and proceeded quickly with the vote.

Finally, the complainant indicated that this letter would serve as a grievance against the union should the memorandum of understanding be adopted. The union informed the complainant in its February 17 letter that it did not recognize the old memorandum of understanding with respect to dispatching, and that the articles of the collective agreement he had cited in support of his request did not apply in his case.

### III

#### Decision

Section 37 reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation*

*of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

Before deciding whether the union's conduct contravenes section 37, it is crucial that the Board keep in mind the exact nature of Mr. Tailleur's complaint. The complainant did not criticize the union for changing the daily dispatching rules, but rather for doing so without giving him the opportunity to reapply for the position of weigher (unloading). According to the complainant, the union had amended the dispatching procedure in order to harm him. More specifically, the complainant alleged that the union had changed the rules of the daily dispatching game without giving him the opportunity to minimize the adverse effects of these changes, i.e., without allowing him to apply for the position of weigher. His testimony in this regard is unequivocal. He testified that this is what he had told the union president when rumours of possible changes to the dispatching system began circulating in May 1993. This is also what he had told Richard Paradis, the union advisor. He repeated the same message at a further meeting with Mr. Langlais on October 8, a few days before the petition began circulating.

The criticism made here of the union does not technically deal with its decision to change a system that clearly was no longer suitable, even if the proposed changes affect rights as important to the members as seniority rights. Many aspects of bargaining deal with such questions, with the result that a bargaining agent is often compelled to revise the seniority rules to meet new needs or new circumstances. The purpose of section 37 is certainly not to limit the union's discretion with respect to changes to the collective agreement, provided the agreement operates for the benefit of all its members and does not discriminate against one member or a group of members (see George Harris et al. (1986), 68 di 1; 15 CLRBR (NS) 328; and 86 CLLC 16,059 (CLRB no. 597); Peter G. Reynolds et al. (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607); and G. Racine et al. (1990), 80 di 1 (CLRB no. 781)).

However, it is clear that union decisions affecting seniority rights, more than any other type of decision, can give rise to differing interpretations of the scope of the duty of fair representation, because any rearrangement of these rights necessarily places the holders of these rights in a "win/lose" situation. This is an important fact of life and of union democracy that the Board must consider when dealing with complaints of breach of the duty of fair representation. A recent work on trade union law examines this duty where there are intergroup conflicts over the allocation of work:

*"Another area in which intergroup conflict often appears is in the allocation of scarce work. Seniority is a factor commonly used in promotion, and more importantly in determining the order of layoff or distribution of available work. The definition of seniority, therefore, and any modifications made to it, can significantly rearrange rights among bargaining unit members. Labour relations boards appear to be suggesting that there is a higher degree of scrutiny where critical job interests are at stake. The union will have to demonstrate that it operated in a rational and justifiable way if it seeks to modify established rights. A board will defer to the union's choice so long as the union demonstrates that the choice is reasonable, based on the rational application of relevant factors, after considering and balancing all legitimate interests without regard to extraneous factors. ...*

*Nevertheless, in practice, boards and courts appear to be quite deferential to union decisions about seniority and allocation of work...*

(Michael MacNeil et al., Trade Union Law in Canada (Aurora: Canada Law Book Inc., 1994), pages 7-11 and 7-12; emphasis added)

Moreover, section 37 prohibits the certified bargaining agent from acting in an arbitrary or discriminatory manner or in bad faith when it makes such changes, as with any decision it makes. For example, if it so happened that in revising dispatching rules, the union intended to penalize the complainant, or used this change as a pretext

for diminishing or limiting the complainant's seniority rights, its conduct would then be considered contrary to the Code.

What is the particular situation revealed by the evidence? The dispatching system in force generated much dissatisfaction because employees were often bumped a few times a day by a senior employee. In fact, the union had received repeated complaints from 96% of the employees. One need not be a genius to imagine the problem that this created in terms of interpersonal relations. For a union, whose responsibility it is to maintain a modicum of harmony and equity between fellow workers, it is therefore perfectly normal to consider how such a situation could be rectified. This is undoubtedly why the complainant, a former union officer, recognized the need for union action in this area. The problems created by the application of these rules were corroborated by the employer representative and by foreman Rancourt. Therefore, there can be no doubt that the union's decision solved a genuine problem, and that this was neither a problem it had manufactured, nor a pretext for taking away Mr. Tailleux's bumping privilege.

In the final analysis, Mr. Tailleux complained of the adverse effect the changing of the dispatching rules had on him. His considerable seniority always guaranteed him interesting work. That he may have experienced deep displeasure and disappointment when these changes were announced is therefore readily understandable.

At issue here however is whether, in introducing these changes, the consequences of which were clearly detrimental to the complainant, the union acted in an arbitrary or discriminatory manner or in bad faith, within the meaning of section 37 of the Code. Did the union have to require the employer to post again the position of weigher, in order to enable the complainant to minimize the adverse consequences of the revised daily dispatching procedure? It should be remembered that the union played no part in Mr. Tailleux's decision to withdraw his application for the position of weigher (unloading). The complainant had assessed the situation to the best of his knowledge,

based on the conditions at the time, i.e., by counting on the dispatching system remaining the same. When the union took steps to change it, and eventually succeeded, the complainant's decision not to apply, which seemed by far the best decision in February 1993, became in January 1994, with the introduction of the new system, clearly unfavourable.

Moreover, the complainant did not claim that there was any connection between his decision not to apply and the subsequent changing of the dispatching system. For example, he did not provide any evidence that the union had persuaded him to withdraw his application when it knew full well that in the coming months it would make changes to the system that favoured the complainant. Nor did the complainant claim that the union had tried, via article 12 of the collective agreement, to "alter" the date of posting so that it could control the unfolding of events to his detriment.

The evidence clearly showed that the two events were initially separate, i.e., that the first occurred in February, whereas the second began to unfold in May, and that there was nothing to connect them. They only became linked in May 1993, when the complainant clearly told Mr. Langlais, during their conversation, that if the dispatching system were changed, he would require that the competition for the position of weigher be reopened. He repeated this request later at the general meeting in January 1994 and in his complaint to the Board as a remedy.

The union therefore found itself in the following situation. On the one hand, it had to address the pressing demands of a vast majority of its members to change the system that each day caused great uncertainty regarding individual work assignments; on the other hand, it had to determine whether it should agree to the complainant's request and obtain the reopening the competition for the position of weigher that had been won earlier by Mr. Brousseau. The union made no secret of the major problem that would be created by bowing to the complainant's wishes: reopening the competition would exacerbate, not solve, the problem. This was why this option was never

seriously explored. Did the union act in this matter in an arbitrary or discriminatory manner or in bad faith?

The Board does not believe so. A union is fully entitled to exercise its judgment regarding what it believes to be the general interest as opposed to individual interest, provided this judgment is exercised on the basis of valid considerations and in a reasonable manner. The decisions of labour relations boards on this question are as numerous as they are unanimous (see Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; Guy N. Cleghorn, October 27, 1995 (LD 1478), approving Rayonier Canada (B.C.) Ltd., [1975] 2 Can LRBR 196 (B.C.); Y.B. Poon et al. (1990), 79 di 156; and 90 CLLC 16,011 (CLRB no. 776); Trade Union Law in Canada, supra, page 7.290; and Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330, pages 1349 and 1351).

In the present case, the union tried to eliminate what clearly was a source of friction in the work place. It is equally clear that any solution to this problem entailed adverse consequences for the complainant in that his considerable general seniority was the main cause of numerous daily bumpings. As viewed by Messrs. Tailleux and Langlais, the solution to the problem was very simple: changes to the dispatching system had become necessary, however the price the complainant was demanding in return for these changes, i.e., the reopening of the competition for the position of weigher, was considered too high by Mr. Langlais for the union. This is the gist of the brief conversation between the complainant and the union president on October 8 where the dividing line between the two camps was clearly drawn. What other explanation can there be for the fact that Mr. Tailleux had already announced to Mr. Langlais that he would file a complaint with the Board?

It is in light of these facts that subsequent events should be assessed, in particular the fact that the union did not bother to contact the complainant to have him sign the petition and resolutely kept him in the dark. The originator of the petition,

Mr. Langlais, knew exactly where Mr. Tailleur stood and, short of "pretending", could hardly have asked him to sign the petition. Mr. Tailleur was equally aware of the position of the union and of its president on the matter. The same applies to the general meeting and its open opposition to the complainant's position. Opposition and the clash of conflicting interests are often unavoidable, particularly in small businesses where contacts and discussions between workers are frequent. It is unfortunate that, in such circumstances, a union does not do more to mitigate the adverse effects on the person who takes the minority position. However, this type of failing should not be confused with a breach of the duty of fair representation. The Board notes in this regard that the union president did not bend over backwards to be open with the complainant regarding the specific course of action that he was planning to take.

The duty of fair representation requires that this type of decision by a union be made honestly and reasonably, in the interests of its members; this duty does not prohibit a union from making decisions that could cause friction or disagreement between members, depending on whether or not the decision benefits them. In the present case, there is no doubt that the complainant was isolated by fellow workers, and that the remarks he made at the general meeting were given a hostile reception. However, unless this behaviour was symptomatic of deliberate bias on the union's part designed initially to settle a score with the complainant by changing the dispatching system, it is not the type of behaviour prohibited by section 37.

To allow the complaint, in this case, would be tantamount to holding the union responsible for the consequences of the choice the complainant had made in February, because by changing the dispatching system the union would have invalidated the reasons on which the complainant had based his decision not to apply. More specifically, to allow the complaint would make the union responsible for the impact of the revised dispatching system on the complainant's initial decision that he had made before the union's decision and that was completely independent of it. In other words, the union would in fact be obliged to restore the initial conditions on the basis

of which one of its members made, in good faith and with full knowledge of the facts, a work-related decision if a subsequent, indeed legitimate, decision by this same union altered these conditions. This would expand peculiarly the scope of the concept of fair representation, not to mention the concept of responsibility, when the sequence of events in no way suggests that the union was guilty of acting in an arbitrary or discriminatory manner or in bad faith.

With regard to the union's refusal to process the complainant's grievance requesting that the competition for the position of weigher be reopened, that decision is not evidence of arbitrary or discriminatory behaviour or of bad faith; instead, it is consistent with the union's decision, made after the complainant decided not to apply for the position of weigher, to change the dispatching rules. The union knew of the disastrous effect that reopening the competition would have in this work environment, particularly for the incumbent who, in all good faith, had applied for the position.

For the complainant, the consequences of the union's decision are obviously unfortunate, but undoubtedly less unfortunate than the consequences of a decision to the contrary would have been for the members as a whole. However, this is the type of judgment that the union must make, provided it is reasonable and does not discriminate against one or more of its members. It is appropriate to reproduce the Board's finding in Guy N. Cleghorn, supra:

*"After reviewing all the submissions on file as well as the officer's report, the Board has come to the conclusion that section 37 of the Code has not been breached in regard to the union negotiating the changes that it did. In situations such as this, unions have a double barrelled shotgun aimed at their heads. No matter what position they take, someone is going to be unhappy. See Y.B. Poon et al. (1990), 79 di 156; and 90 CLLC 16,011 (CLRB no. 776).*

*In Rayonier Canada (B.C.) Ltd., [1975] 2 Can LRBR 196; the B.C. Board had the following to say about conflicts between employees:*

*'... When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.'*

*(pages 203-204)*

*There is no evidence that the union acted improperly when it made the agreement it did. The union does not have to be all things to all people, and can perform in the manner it has done so long as its actions are not arbitrary, discriminatory or in bad faith. When the union made the settlement it did, it obviously was aware of the effect on Mr. Cleghorn and others. However, the union had to do what it considered best for its whole membership when it negotiated the settlement."*

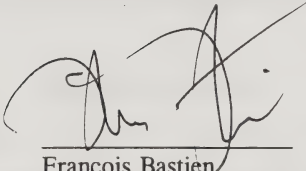
*(pages 4-5)*

In short, this analysis reveals that the union's decision to change the daily dispatching procedure was in no way the product of discrimination against the complainant, but of a desire to solve a genuine problem caused by the combined effect of the old dispatching procedure and the decreased volume of work, which resulted, in practice, in the complainant's frequently exercising his bumping right each day. These events created, as we saw, friction in the work place to which the union had a duty to respond.

Because the complainant had to bear the brunt of the change in the dispatching procedure, it is appropriate to ask whether there were solutions, other than creating a new position, that would have offered a better chance of reconciling the requirements of the complainant's considerable seniority and the need for greater stability in the daily dispatching of junior employees. In any event, the decision at


issue here was the union's to make, and it is not up to the Board to make that decision in its place.

The union decided to change the dispatching procedure, not because it was unaware of the impact of its decision on the complainant, or the complainant's specific requirements in return for changing the procedure, i.e., reopening the competition, but because it felt that all its members would benefit from this measure. There is nothing in the evidence to suggest that this decision was made in an arbitrary or discriminatory manner or in bad faith within the meaning of section 37 of the Code. Mr. Tailleux's complaint is therefore dismissed.



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François Bastien  
Member



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Véronique L. Marleau  
Member

**Dissenting Opinion of Mr. Jean L. Guilbeault, O.C., Vice-Chair**

I have read the decision of the majority. With all due respect, I view differently the principal element that gave rise to the dispute.

The complainant stated that, in accordance with an agreement entered into in 1989, he could choose in the work place the jobs to which his seniority entitled him, with the corresponding pay, needless to say. Junior workers were unhappy with this arrangement because they could be bumped, on very short notice, from the best paying jobs.

An initial proposal for change recommended replacing general seniority, which benefited the complainant, with seniority by position, which was more beneficial to junior employees. The complainant lost all privileges relating to his seniority within the company.

It should be noted that the complainant stated that he was very familiar with the bargaining process and the signing of a memorandum of understanding, having been a union representative during the negotiations that led to the signing of the 1982, 1985 and 1988 collective agreements. Moreover, he was replaced as president in 1991 by Adrien Langlais, who still holds this office.

A letter from the union president put an end to the grievance filed by the complainant on February 2, 1994. On February 15, 1994, the employer, for its part, rejected the grievance, citing the new agreement ratified on January 28, 1994.

Unable to avail himself of the grievance procedure, the complainant filed the present complaint, alleging that the change in the dispatching of personnel discriminated against him and that the handling of his grievance was arbitrary, in violation of section 37 of the Code.

In an effort to find a compromise, the complainant asked that the positions of weigher (unloading) and weigher (loading) be posted again to enable him to apply. With respect, I do not agree with the majority which stated that the complainant essentially claimed that he was not given the chance to apply again for the position of weigher (unloading). In my opinion, he essentially claimed that the union had changed the rules of the game, which amended the job description of weigher. The complainant argued that had he known that this change denied him the rights he had acquired through his seniority and favoured the junior employees, he would have applied for the position of weigher in due course.

I note that, in its letter of February 15, 1994, the employer officially recognized the agreement of August 14, 1989 entered into with the union, headed at the time by the complainant. This agreement was not recognized by the union represented by its current president, Adrien Langlais.

#### Reasons for Dissent

It is important to note that the agreement ratified on January 28, 1994 by the union members is not the result of negotiations with the employer. The employer did not offer or concede anything in return, and the union did not ask the employer for anything. The employer left it entirely to the union to settle an internal problem that affected only the union, namely, the simmering discontent and dissatisfaction of employees in their relations with one another during the daily dispatching of personnel. The situation is clearly outside the scope of the traditional collective bargaining system.

In my opinion, these facts distinguish this case from the Board decisions cited by the majority; those decisions deal with the duty of fair representation in the context of collective bargaining when rights based on seniority can be seriously curtailed without giving rise to a recourse based on section 37 of the Code.

In the circumstances of this case, the duty of fair representation must be assessed having regard to the manner in which the union dealt with the employee rights conferred by the collective agreement.

Seniority is an important right that each employee acquires during the term of successive collective agreements. An employee who has waited his turn for 20 years on the seniority list cannot be downgraded without seriously questioning the reasons for this displacement. As a junior employee, he was told by senior employees to wait his turn. Now that his turn has come, junior employees who no longer want to wait their turn cannot bump him without serious reasons that withstand the test of section 37 of the Code.

In accordance with the duty of fair representation, the union cannot discriminate against its members for reasons that are contrary to the general scheme of the Code. Although the word discrimination is itself pejorative, certain decisions use the expression "just discrimination" to characterize conduct whereby a union, although acting in good faith, does not enforce equitably the equal rights of members of a bargaining unit who, circumstances dictate, find themselves in a new power relationship in relation to one another. This conclusion is inescapable, according to the union, in the context of the present case.

Was there not extensive consultation between the members? Was the decision to change the dispatching system not approved by an overwhelming majority of 22 to 2? Should the interests of the group as a whole not take precedence over the interests of a small minority? If the complainant's rights were sacrificed, which the union claims was the result of negligence of the part of the complainant who did not apply for position of weigher, this was the inevitable result of change that cannot please everyone at the same time, but which is necessary given the need to administer a trade union harmoniously.

However, an analysis of all the details of this case reveals the inconsistency of the union's position.

At a meeting held on August 14, 1989, the employer's supervisors drafted a document dealing with the procedures for the daily dispatching of employees. These procedures were accepted by the union that same day. This document is viewed differently today by the parties.

According to the complainant, who was union president at the time, this document is a memorandum of understanding that is part of the collective agreement. The union, for its part, in a letter of February 17, 1994 bearing the signature of its current president, Adrien Langlais, "does not recognize" this "old memorandum of understanding."

In its April 12, 1994 letter to the Board, the employer stated that the daily dispatching was done at the time by its supervisory personnel according to the procedure established by the employer and the union on August 14, 1989.

Given these apparent contradictions, I turn to the testimony for an explanation that could enlighten me concerning the intrinsic value of that document.

Conrad Desnoyers, testifying for the employer, stated that the employer never asked that the 1989 dispatching procedure be changed. According to him, there was never any chaos on the docks, or complaints or grievances filed by the union. He testified that it was incorrect to say that the 1989 dispatching system "was collapsing." According to him, the proposal to change this procedure originated solely with the union; this was the only aspect of the collective agreement that it was being asked to change and the employer offered to meet to discuss the matter.

Under cross-examination, Mr. Desnoyers stated that the document was never officially incorporated in the collective agreement so as to give the employer the necessary leeway to revise the dispatching procedure and address adequately pressure from the union on this matter. He admitted that there was "gripping" on the docks: because of the 1989 procedure, the complainant took advantage of his seniority to bump junior employees in weighing ... This is what led the union to prepare the

proposal for change that did not satisfy the complainant: ... he was excluded from weighing and assigned work as a labourer, a demeaning job, etc. The employer then suggested that the union get the approval of its members, which it eventually did.

According to André Gauvreau, negotiator for the 1985 and 1989 collective agreements, there was no dispatching system prior to 1989: it was every man for himself. A first attempt was made to organize dispatching, but it interfered with seniority and was quickly rejected. The union helped draft the 1989 agreement. There was consultation and posting in order to reach a consensus without canvassing opinion.

Other witnesses, namely Carol Rancourt, Charles Paradis and Adrien Langlais, testified about the circumstances leading to the drafting of the proposal for the new system. Discussions among themselves and with the complainant revealed that, if the competition for the positions was not reopened, the complainant would not agree, under pressure, to a new dispatching procedure.

In light of the testimony of these various witnesses, I conclude that the 1989 agreement is part of all the terms and conditions of employment contained in the collective agreement. Mr. Tailleur's decision to withdraw his application for the position of weigher (unloading) was in his favour in February 1993. It was the changes imposed by the union in January 1994 that made this decision unfavourable.

Mr. Tailleur's request to reopen the competition was a panic reaction to a situation he could not control, given his minority position in the union. Moreover, it is clear that the changes made favoured those who were the source of the discontent during the daily dispatchings. I note that the union refused to recognize the agreement of August 14, 1989; it could not claim that it had a right to err in its interpretation of a collective agreement that it is weakening to its advantage.


To refuse to recognize a provision that does not suit its purpose is tantamount to a demonstration of bad faith, the effect of which, in the instant case, is to discriminate against a senior member in relation to junior members. This senior member lost his right to chose jobs based on general seniority, a right he clearly had under the existing collective agreement.

There is also the matter of the deterioration of relations between the complainant and his fellow workers. The argument that the group interest takes precedence is biased; the issue is rather the interest of the majority in denying the rights of a minority, a majority that the union president, Mr. Langlais, favours for obvious electoral reasons.

I would not hesitate to find that the union contravened section 37 of the Code for refusing to fulfil the obligations associated with the duty of fair representation that is "genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee" (Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, page 527).

As a remedy, I would have rescinded outright the alleged agreement of January 28, 1994, with effect retroactive to that date, waived the time limit for referring the grievance filed on February 2, 1994 to arbitration, and ordered the union to pay the reasonable fees of a lawyer chosen by the complainant to present the grievance.

The Board would have remained seized of the case in order to decide whether other remedies could or should be granted.

  
Jean L. Guilbeault, Q.C.  
Vice-Chair



# information

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## Summary

International Brotherhood of Locomotive Engineers, *applicant*, James H. Rousseau, *respondent*, and Canadian National Railway Company, *employer*.

Board File: 530-2465  
CLRB/CCRT Decision no. 1173  
August 2, 1996

(Reconsideration of CLRB decision no. 1127)

This matter concerns an application for reconsideration of a panel of the Board's decision dealing with a complaint pursuant to section 37 of the Canada Labour Code concerning the union's obligation of fair representation at arbitration. The case was considered by the full Board in plenary session given that the application raised a question of policy.

The questions dealt with the Board's policy concerning the nature and extent of its intervention in union representation at arbitration, the issue of a continuing duty of fair representation and the extent of the Board's remedial power in light of the existence of a continuing duty of fair representation after the arbitration process.

In answer to the first question, the Board stated that the existing policy concerning its limited role to play with respect to the quality of representation at arbitration should not be modified, and concluded that the original panel had engaged, contrary to this policy, in a microscopic examination of the union's conduct during the arbitration proceedings.

## Résumé

Fraternité internationale des ingénieurs de locomotives, *requérante*, James H. Rousseau, *intimé*, et Compagnie des chemins de fer nationaux du Canada, *employeur*.

Dossier du Conseil: 530-2465  
CLRB/CCRT Décision n°1173  
le 2 août 1996

(Réexamen de la décision du CCRT n° 1127)

La présente affaire traite d'une demande de réexamen d'une décision d'un banc du Conseil portant sur une plainte fondée sur l'article 37 du Code canadien du travail et concernant le devoir du syndicat d'assurer une représentation juste à l'arbitrage. Elle a fait l'objet d'un examen par le Conseil réuni en séance plénière puisque la demande soulevait une question de principe.

Les questions portent sur la politique du Conseil relative à la nature et à l'étendue de son intervention dans la représentation syndicale à l'arbitrage, le devoir de représentation juste après l'arbitrage et l'étendue du pouvoir de redressement du Conseil compte tenu de l'existence d'un devoir de représentation juste après l'arbitrage.

En réponse à la première question, le Conseil déclare que la politique existante relative à son rôle restreint en ce qui a trait à la qualité de la représentation à l'arbitrage ne doit pas être modifiée. Par ailleurs, il conclut que, contrairement à cette politique, le banc initial a procédé à un examen rigoureux du comportement du syndicat pendant la

The complaint pursuant to section 37 was therefore dismissed.

With respect to the other questions, the Board confirmed the original panel's conclusion that a continuing duty of fair representation existed beyond arbitration and could include an obligation to consider seeking judicial review, but emphasized that the scope of its remedial power is to be determined on a case-by-case basis.

A dissenting opinion is in the course of preparation and will be sent to the parties as soon as possible.

procédure d'arbitrage. La plainte fondée sur l'article 37 est donc rejetée.

En ce qui a trait aux autres questions, le Conseil confirme la décision du banc initial selon laquelle il existe de fait un devoir de représentation juste après l'arbitrage, pouvant inclure l'obligation de présenter une demande de révision judiciaire; il fait toutefois ressortir que l'étendue de son pouvoir de redressement doit être décidée de façon ponctuelle.

Une opinion dissidente est en voie de préparation et sera envoyé aux parties dans les plus brefs délais.

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Travail

## Reasons for decision

International Brotherhood of Locomotive  
Engineers,

*applicant,*

*and*

James H. Rousseau,

*respondent,*

*and*

Canadian National Railway Company,

*employer.*

Board File: 530-2465  
CLRB/CCRT Decision no. 1173  
August 2, 1996

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This matter was considered by the full Board meeting in a plenary session on June 28, 1996 in Ottawa. The Board was comprised of J.F.W. Weatherill, Chairman, L. Doyon, J.P. Morneau, J.L. Guilbeault, Q.C., R.I. Hornung, Q.C., and S. Handman, Vice-Chairs, and M. Eayrs, P. Shafer, V. L. Marleau, S. FitzGerald, R. Aronovitch and D. Gourdeau, Members.

The reasons for decision written by J.F.W. Weatherill, Chairman.

A dissenting opinion is in the course of preparation and will be sent to the parties as soon as possible.

### I

There is before the full Board an application to reconsider the decision of a panel dealing with the complaint of James H. Rousseau, the respondent in the present application. Mr. Rousseau had alleged that the Brotherhood of Locomotive Engineers (BLE or the union), the applicant in the present proceedings, had violated section 37

of the Canada Labour Code in that it had, as is said in the decision of the original panel:

*"... denied him fair representation when submitting his grievance to the Canadian Railway Office of Arbitration (CROA). He claims that, given his 24 years of service with the Canadian National Railway Company (CN), which was clear of any disciplinary penalty, and the severity of the penalty imposed by CN, the union, by way of its counsel, had acted in a discriminatory and arbitrary manner."*

(James H. Rousseau (1995), 98 di 80; and 95 CLLC 220-064 (CLRB no. 1127), pages 81; and 143,547)

The original panel, in that decision, concluded that there had been a violation of section 37 and, considering that no other remedy was available in the circumstances (Mr. Rousseau's grievance having been heard by an arbitrator and dismissed), granted relief in the form of damages. The BLE applied pursuant to section 18 of the Code for reconsideration of that decision, and after consideration of the parties' submissions, a summit panel determined that the application raised a question of policy which should be referred to a plenary session. The following questions were referred to the Board:

*"1. (a) Having regard to the facts as found by the original panel, was its conclusion that the union violated section 37 of the Code by its conduct in relation to the representation provided during the arbitration of the complainant's grievance one which is in accordance with Board policy?*

*(b) Should Board policy with respect to the above question be modified or restated?*

*2. (a) Having regard to the facts as found by the original panel, was its conclusion that the union's duty of fair representation pursuant to section 37 of the Code continues after an arbitral award one which is made in compliance with Board policy?*

*(b) If the Board's policy is that the union's duty of fair representation continues after an arbitral award, is such duty limited*

*to supervising the implementation of the arbitration award or does it extend to the obligation to seek judicial review of the same?*

*(c) Should Board policy in this regard be modified or restated?*

*3. In the event that the Board determines that the union's duty of fair representation persists during and/or after the arbitration process, does the Board have power to order a remedy, pursuant to section 99, consequent upon such a breach by the union, and what is the extent of this power?"*

## II

We will deal with the questions referred to us in the order in which they appear.

*"1. (a) Having regard to the facts as found by the original panel, was its conclusion that the union violated section 37 of the Code by its conduct in relation to the representation provided during the arbitration of the complainant's grievance one which is in accordance with Board policy?"*

This question puts in issue the original panel's conclusion that the union had violated section 37 of the Code "by its conduct in relation to the representation provided during the arbitration of the complainant's grievance." In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, Chouinard J., giving the judgment of the Court, stated the following:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

*1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

*2. When, as is true here and as is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

*3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

*4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

*5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527)

It is important to note that the Gagnon decision, which we accept as setting out the general principles applicable in cases such as this, was not one by way of judicial review of a decision of a labour relations board, but was an appeal from a decision of the Quebec Court of Appeal, upholding a decision of the Quebec Superior Court. The Superior Court and the Court of Appeal both found that the union had breached its duty of representation by failing to conduct a thorough investigation, which would have shown that the respondent employee's transfer constituted a disguised dismissal and therefore was subject to arbitration under the collective agreement. The instant case is one of reconsideration, pursuant to section 18 of the Canada Labour Code, and the questions of policy being determined are before the full Board, as noted above, "having regard to the facts as found by the original panel."

In the Gagnon case, the Supreme Court of Canada allowed the appeal and dismissed the action. The headnote of the report summarizes the Court's reasoning as follows:

*"... It was not established that the Union acted in an arbitrary, discriminatory, negligent or hostile manner in its representation of the respondent. Nor can failure by the Union to undertake a thorough investigation be compared to bad faith in such a way to make it liable to respondent. The Court of Appeal itself recognized that the Union had been made aware by respondent of all the facts and had all the necessary elements to take an informed position. Clearly, the Union cannot be blamed for relying on the reasoned opinion of its legal counsel."*

This Board, of course, must apply the provisions of section 37 of the Canada Labour Code, which govern the instant case. Section 37 reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

The Board's policy with respect to the nature and extent of its intervention, based on its assessment of the quality of a union's representation of an employee during arbitration proceedings, is one of circumspection. The Board has a very limited role to play with respect to the quality of representation at arbitration (and that is the question now before us), and will only examine the conduct of the union or of counsel in very unusual circumstances. It is sufficient here to refer to the case of Lucio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376), where the Board's policy is clearly set out:

*"It would be a clear case of the tail wagging the dog if this Board were to effectively quash arbitration awards because we disapproved of the manner in which a union presented a grievance at arbitration. We do not consider it to be within the purview of our role or responsibility to evaluate the competence of union representatives or their counsel. Nor do we consider it to be compatible with the public policy purposes and objectives of party controlled compulsory*

*grievance arbitration as a substitute for mid-agreement work stoppages in section 155 of the Code... The duty of fair representation has a role under the Code but it must have its limits. That limit falls short of an avenue of appeal from arbitral decisions based upon a judgment by this Board's... members about the competence and performance of union representatives and their counsel.*

*Human behaviour is too diverse for the establishment of unequivocal rules. We cannot say that the duty of fair representation has absolutely no role during the arbitration process. There may be the extreme case where a union in bad faith merely puts on a charade with employer collusion or the union representative or counsel appears inebriated. Those like all cases in this area will turn on their facts. The message is, however, that this Board will not, through the duty of fair representation, microscopically review union conduct during arbitration proceedings."*

(pages 50-51; 214-215; and 709-710)

While acknowledging the expertise and experience of counsel, and while also acknowledging that this was not a case involving discrimination or bad faith on the union's part, the original panel nevertheless concluded that the union, in its presentation of the grievor's case at arbitration - and in other respects to which we shall refer - had behaved in an arbitrary manner.

With respect to the manner in which Mr. Rousseau's case was presented at arbitration, the panel appears to be critical of the fact that expedited arbitration, in a system established in the collective agreement between the union and the employer, was used. The panel questions the thoroughness of the explanation of the procedure given to Mr. Rousseau and the effect (in its view) of the failure to call certain witnesses. It is clear from a reading of decision no. 1127 that, for the purpose of reaching its conclusion, the original panel had indeed microscopically reviewed the union's conduct during the arbitration proceedings in question.

The panel expressed particular concern with certain after-acquired evidence, not available at arbitration, indicating that certain other persons, who may have been involved in the same activities as those which led to Mr. Rousseau's discharge, or whose cases may have been arguably similar were, in the end, treated differently. The panel was also critical of the union's investigation of the matter, and of counsel's failure to tell Mr. Rousseau "that he had, or may have had, rights under Part III of the Code." This latter would appear to be a reference to sections 240 ff. of the Canada Labour Code which provide certain procedures open to a discharged employee "who is not a member of a group of employees subject to a collective agreement." Mr. Rousseau was, of course, a member of such a group at the material times, and the provisions of Part III of the Code did not apply to him. As to the sufficiency of the union's investigation, it must be said that the investigation was at least sufficient to lead the union to refer promptly Mr. Rousseau's grievance to arbitration, and to engage experienced counsel for the presentation of the case.

In most cases of alleged violation of section 37, where the Board has been persuaded on the evidence that a union has breached its duty of fair representation by failing to proceed to arbitration, that is precisely the remedy the Board would order. In the instant case, that was done. Any remedy that a complainant may have been granted prior to arbitration would, therefore, generally be subsumed by the arbitration process. This is not to say that taking a grievance to arbitration relieves the union of a continuing duty of fair representation.

In the instant case the question, somewhat unusually, deals with the representation provided at arbitration, and as decision no. 1127 shows, the original panel did engage, contrary to the policy of the Board, in a microscopic examination of the union's conduct during the arbitration proceedings. While, with the benefit of hindsight, it might be considered that the case could have been presented differently, that is not the question to be asked in respect of the application of section 37 of the Code.

For the foregoing reasons, the full Board concluded that the answer to question 1(a) is no.

Question 1(b) is as follows:

*"1.(b) Should Board policy with respect to the above question be modified or restated?"*

With respect to this question it is our view that the Board's policy, as set out in Samperi, supra, and other cases, should not be modified and need not be restated. That policy complies, in our view, with the principles set out by the Supreme Court of Canada in the Gagnon case. Our answer to question 1(b) is therefore no.

Question 2(a) is as follows:

*"2.(a) Having regard to the facts as found by the original panel, was its conclusion that the union's duty of fair representation pursuant to section 37 of the Code continues after an arbitral award one which is made in compliance with Board policy?"*

With respect to this question let us note that the original panel did not find that the trade union was in fact in breach of any continuing duty of fair representation. The panel considered, however, that there was such a duty. In this respect, we consider that the original panel was correct. The Board's policy in this respect has been set forth in Aditya N. Varma (1991), 86 di 66; 15 CLRBR (2d) 307; and 92 CLLC 16,020 (CLRB no. 894), where the Board stated that judicial review fell outside the scheme of collective bargaining contemplated by section 37 of the Code (although a different approach was taken in Tony Pepe, October 4, 1993 (LD 1212), and Brian L. Eamor (1996), as yet unreported CLRB decision no. 1162).

Section 37 of course imposes on trade unions a duty of fair representation "of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them." Arbitration of a grievance may be loosely described as a right arising under the agreement although it is not, under most collective agreements, a right that may be exercised by individual employees, and in any event it is a right that must be exercised in accordance with the terms of the collective agreement.

Arbitration is a process through which the substantive provisions of a collective agreement may be enforced. It is those provisions that create the "rights under the collective agreement" to which section 37 of the Code refers, and with respect to which trade unions must fairly represent members of bargaining units. In most cases arising under section 37, the question has been whether or not that duty has been violated by a failure on the union's part to take a grievance to arbitration. Judicial review of an arbitral award is not necessarily a "right" that arises, or perhaps could arise, under a collective agreement. It is conceivable, however, as for example in the "extreme" type of case referred to in Samperi, *supra*, that the enforcement of rights under a collective agreement, and the fair representation of bargaining unit members in respect of such enforcement would require a union to seek judicial review of an arbitration award. In this regard, the original panel aptly referred to the decision of the Supreme Court of Canada in Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330. In that case, L'Heureux-Dubé J., writing the judgment of the Court, stated:

*"In this connection I should say at the outset that a union's duty of fair representation does not cease in relation to a grievance proceeding once the grievance has gone to arbitration. It may continue even after the arbitrator's final decision (for example, in Asselin v. Travailleurs amalgamés du vêtement et du textile, local 1838, [1985] T.T. 74, at p. 93, where the Labour Court concluded the union had a duty to evoke the arbitrator's erroneous decision), subject to Gendron v. Municipalité de la Baie-James, [[1986] 1 S.C.R. 501], which held that in such a case the s. 47.5 L.C. procedure could not be applied. As Gagnon, LeBel and Verge point*

*out, this duty of fair representation, as a corollary of the exclusive right of representation, must inform all the union's action throughout (Robert P. Gagnon, Louis LeBel and Pierre Verge, Droit du travail (1987), at p. 311):*

*'[Translation] The duty of representation will end with the loss of certification. Until that happens, the union will be held to it at all stages of the collective representation, both in negotiating the content of the collective agreement and in its implementation as it affects one or other of the employees.'*"

(pages 1347-1138)

(Under section 37 of the Canada Labour Code, of course, the duty of fair representation applies only in respect of "rights under the collective agreement.")

Our answer to question 2(a) is accordingly that the Board's policy on this topic should be changed as follows: the duty of fair representation continues after an arbitral award, as explained in our answer to question 2(b).

Question 2(b) is as follows:

*"2.(b) If the Board's policy is that the union's duty of fair representation continues after an arbitral award, is such duty limited to supervising the implementation of the arbitration award or does it extend to the obligation to seek judicial review of the same?"*

Regarding this question we consider that fair representation of employees in respect of rights under a collective agreement may, in some circumstances, involve an obligation to consider seeking judicial review of an arbitral award. Such circumstances would, we expect, be extremely rare. We do not consider that what we are now saying differs substantially from what the Board said in Gordon Newell (1987), 69 D.L.R. (4th) 119 (CLR.B no. 623): "In the Board's judgment, a refusal or failure to seek judicial review is not of itself a violation of section 136.1 [now section 37]" (page 128; emphasis added). It should be noted, however, that in that case the Board considered that only if the collective agreement imposed a duty to take matters to judicial review

would the union's duty extend so far. We do not consider that restriction to be justified by the provisions of section 37 of the Code.

The duty owed by a union in determining whether or not to proceed with a judicial review application does not exceed that required in deciding to proceed to arbitration in the first place. Indeed, it is exactly as expressed by the Supreme Court of Canada in the Gagnon case. As indicated by this Board in Eamor, supra:

*"The union's obligation, pursuant to section 37, to represent its members in grievance matters, does not cease when the arbitration process commences; (Centre hospitalier Régina Ltée, supra, and Tony Pepe, October 4, 1993 (CLRBD 1212)). It begins at the time the union becomes aware of circumstances which require it to perform in a representational capacity and continues until the final conclusion of the matter. In the appropriate circumstances, it may include the conduct of the union at the arbitration and/or the obligation to proceed to judicial review of the arbitration decision. Section 37 imposes an obligation on the union to make a determination regarding a judicial review application based on the same standards developed with respect to its decision not to proceed to arbitration."*

(page 40)

Our answer to question 2(b) is accordingly that the duty of fair representation may in some circumstances include an obligation to consider seeking judicial review of an arbitral award.

Question 2(c) is as follows:

*"2. (c) Should Board policy in this regard be modified or restated?"*

Regarding what was said in respect of questions 2(a) and (b), it will be clear that our answer to question 2(c) is yes. The policy is restated in our answer to question 2(b); above.

Question 3 is as follows:

*"3. In the event that the Board determines that the union's duty of fair representation persists during and/or after the arbitration process, does the Board have power to order a remedy, pursuant to section 99, consequent upon such a breach by the union, and what is the extent of this power?"*

With regard to question 3, it is clear from the provisions of section 99 of the Code that where the Board determines that there has been a contravention of or a failure to comply with section 37 of the Code, or of any of the other sections referred to in section 99, certain remedial measures may be taken. In cases of contravention of section 37, section 99(1)(b) provides that the Board may impose requirements relating to "such action or proceeding as the Board considers that the union ought to have taken." In our view, in a proper case, this could include a requirement that the union institute proceedings for judicial review of an arbitral award. As well, under section 99(2), the Board may require an employer or a trade union "to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of [the objectives of Part I of the Code]."

The Board's remedial powers under section 99 of the Canada Labour Code were the subject of consideration by the Supreme Court of Canada in the recent case of Royal Oak Mines Ltd. v. Canada Labour Relations Board et al. (1996), 193 N.R. 81; and 96 CLC 210-11. In his reasons for decision, Cory J., with whom the majority of the Court concurred, wrote as follows:

*"The breadth of the remedial section gives a clear indication that it was the intention of Parliament that the Board should be given the necessary flexibility to fashion remedies which will best address the entire spectrum of problems and of factual situations which it must confront. It is noteworthy that the section was amended in 1978. Prior to that date, the Code allowed the Board to impose only those remedies which were specifically enumerated. Section 189 (now*

*s. 99(2)) was added in 1978. This provision authorizes the Board to make orders based on the principles of equity. The section now gives the Board both the flexibility and the authority to create the innovative remedies which are needed to counteract breaches of the Code and to fulfil its purposes and objectives. The granting of such a broad discretion to the Board demonstrates that Parliament wished the courts to defer to the Board's experience and expertise in making remedial orders so long as they were not patently unreasonable."*

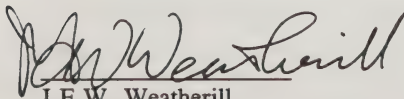
(pages 122; and 141,095)

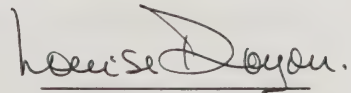
In the present case, had the original panel's conclusion been justified by the application of the Board's policy to the facts (which was not the case), the remedy ordered (payment of damages) would, in our view, have been within the scope of the Board's power under section 99 of the Code. Whether or not any particular remedy comes within the scope of such power is a matter to be determined on a case-by-case basis.

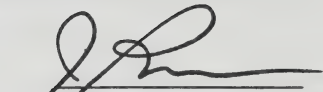
Our answer to question 3 is yes, the Board has such a remedial power; the scope of its exercise is to be determined on a case-by-case basis.

### III

The responses of the plenary session of the Board to the questions referred to it are set out above. In the instant case, the conclusion must be that made in response to question 1(a): on the facts set out in the initial decision (which facts are not, and cannot now, be put in question), the original panel's finding is contrary to Board policy and cannot stand. Accordingly, the application for reconsideration is allowed, and the section 37 complaint is dismissed.

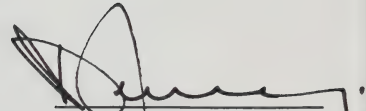
  
J.F.W. Weatherill  
Chairman

  
L. Doyon  
Vice-Chair



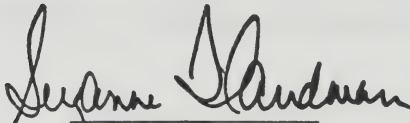
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J.P. Morneault  
Vice-Chair



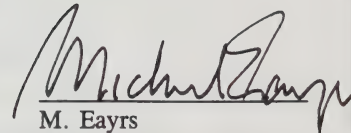
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R.I. Hornung, Q.C.  
Vice-Chair




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S. Handman  
Vice-Chair



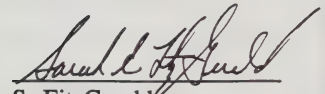
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M. Eayrs  
Member



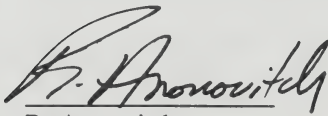
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V. L. Marleau  
Member



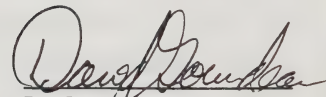
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S. FitzGerald  
Member



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R. Aronovitch  
Member



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D. Gourdeau  
Member

Dissenting Opinion of Mr. Jean L. Guilbeault, Q.C.

I have read the majority decision issued by the full Board in this case; with due respect, I do not concur with that decision.

The reconsideration panel referred three main questions to the plenary. This dissenting opinion concerns only the first.

*"Having regard to the facts as found by the original panel, was its conclusion that the union violated section 37 of the Code by its conduct in relation to the representation provided during the arbitration of the complainant's grievance one which is in accordance with Board policy?"*

Certain legal principles necessarily apply at the outset.

Firstly, the full Board does not sit in appeal of a decision of the original panel as to the facts established in evidence. The majority decision is therefore considered on the basis of this jurisdictional restriction.

Furthermore, the reconsideration panel imposed time and space restrictions on the matter referred to the full Board. With regard to time, it limited the review of the decision a quo to the facts established "during the arbitration of the complainant's grievance." In view of this wording, the question referred to the full Board must deal only with a portion of the evidence provided by the complainant, namely, that surrounding the arbitration of the grievance.

The reconsideration panel also imposed space restrictions on the matter referred to the full Board. The fact that the decision a quo establishes that the duty of fair representation pursuant to section 37 may have been breached in the period prior to the arbitration is not contrary to Board policy. The full Board has no jurisdiction to

modify, amend or alter the question which was referred to it by the reconsideration panel and which deals only with the arbitration period.

The period examined by the original panel is the 90 days prior to the date on which the complaint was filed. The original panel can justifiably allow that be placed in evidence several events prior to the period under investigation in order to look for indications as to whether the alleged action, namely the union's breach of its duty of fair representation, and the circumstances surrounding the wrongful action constitute a violation of section 37 of the Code. This analysis can only serve to define the context of this case more clearly (Gordon D'Eri (1992), 89 di 211 (CLRB no. 969); Rogers Cable T.V. Ltd. (Hamilton) (1992), 88 di 84; and 92 CLLC 16,053 (CLRB no. 942); Canada Post Corporation (1985), 60 di 104 (CLRB no. 504).)

Any legal finding regarding Board policy arising in the present case from the factual evidence during the arbitration becomes academic. On the one hand, the full Board can answer "yes" to the question without quashing the whole decision a quo, part of which is assumed to be consistent with Board policy since it is not subject to the full Board's power of review.

On the other hand, the full Board can answer "no" to the question without improving the decision a quo which needs no improvement.

The majority should have explained how the decision a quo as a whole was tainted by a kind of "anti-lawyer animus" during the period of arbitration alone; it should have established that the decision a quo is based solely on events that occurred during the arbitration; it should have identified the reprehensible events from all the evidence given and issued an ad hoc decision. It did not do so, perhaps in fear of departing from its jurisdiction. Then, how does it reconsider that decision a quo? Could it be by reviewing the facts of the case, without admitting it, that which the full Board did and could not do.

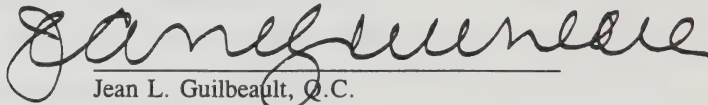
I could have gone on at great length about the role of the complainant's lawyer during the arbitration of this sad case. The lawyer chose to testify before the original panel on his role in this complaint. To my knowledge, there is no contradiction between his microscopically examined conduct, that which is prohibited by the policy set out in Lucio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376), and the evaluation of the testimony of a witness from which the testifying lawyer cannot be exempt.

The decision a quo has not contravened any Board policy. I read the authorities on which this dissenting opinion is based, in particular the decision in Lucio Samperi, supra, which I believe is the only case which defines the phrase "during the arbitration" as referring to the hearing before the arbitrator. I would consent to extend this period to that required to decide on a strategy and prepare witnesses (there were no witnesses here, and Mr. Rousseau never had "his day in court"); this extension notwithstanding, the question is quite lame and did not, in my opinion, warrant referral to the full Board.

Finally, the Canada Labour Relations Board, a quasi-judicial tribunal, has no obligation to give reasons for its decisions (Terminaux Portuaires du Québec Inc. v C.U.P.E. (1992), 93 D.L.R. (4th) 187 (F.C.A.)); however, in practice, it does give reasons for its decisions. It is the full Board that, exceptionally, rendered a decision, rather than refer the case to the original panel, without giving its reasons. The section 37 complaint is dismissed. However, the following was established before the panel a quo: the mix-up with respect to the filing of the grievance, the errors regarding dates, the incomplete evidence concerning the facts, in addition to 23 years of loyal service, an unblemished disciplinary record, a harsh dismissal, the loss of all severance pay, and so on and so forth, all elements of proof in the complainant's favour which the union did not submit to the arbitrator because of its lack of interest in the case, of the superficial manner in which it handled this case from the outset and of its gross negligence. The duty of fair representation was not fulfilled, and section 37 of the Code was violated.

I interpret the privative clause of the Code which the courts have sometimes described as "impervious" and which is intended to protect the original decision from interminable appeal proceedings which delay the finalization of cases referred to the Board. Need I repeat that review is possible only on showing irrefutably that the panel a quo has incorrectly applied an articulate and undisputed policy of the Board.

To question 1.(a) as referred, I answer "yes," and to question 1.(b), I answer "yes."

A handwritten signature in black ink, appearing to read 'Jean L. Guilbeault', written over a horizontal line.

Jean L. Guilbeault, Q.C.  
Vice-Chair

Dissenting Opinion of Patrick H. Shafer

I have read and considered the reasons for decision of the majority and with due respect I hereby dissent.

It is my opinion that a careful review of the letter of the law has been conducted, with very little consideration to the facts in this case as they apply to a person who has lost his job of 23 years with a previously perfect record.

I believe very strongly that the Brotherhood of Locomotive Engineers (BLE or the union) conducted what could only be considered a perfunctory and superficial investigation and simply turned the case over to counsel to proceed to arbitration.

This simple process does not absolve the union from its duty under section 37.

In my mind, the union had a certain responsibility to try to slow down the process because three other employees [Messrs. Walton, Malloy and Beattie] were being treated in other proceedings. The criminal process could not, in any way, be considered as expedited. Why then not slow down the process in which Mr. Rousseau's case was being handled. There is a suggestion that dismissal grievances were always processed expeditiously through the Canadian Railway Office of Arbitration (CROA). I doubt that the arbitrator would not see reason to put this case on hold. Are there not exceptions to every rule?

Furthermore, I wonder why Mr. Rousseau's impeccable 23-year record was not put forward at arbitration. I realize the Board has no place in this process, but I believe it must call into question the BLE's duty to ensure the grievor is treated fairly.

I find it difficult to accept that counsel objected to the fact that we sat in judgment of the arbitral award. I also take exception to the fact that we are saying that because the award was unfavourable, the union should therefore seek judicial review.

According to the facts, four individuals were involved in a questionable but accepted practice of getting "free rides" (free transportation of goods in empty cars). This practice is well known and well accepted, especially in the North and remote areas. One person was fired and the other three were suspended while being investigated under the criminal code. Mr. Rousseau was put on a fast-track CROA, while his union did little or nothing and provided no contradictory evidence at the hearing. In five months, the arbitrator made a finding against the grievor and dismissed the case. In his award, arbitrator Picher referred to Mr. Malloy, one of the other three persons involved.

*"Such a decision is commensurate with the gravity of the offence, is consistent with the treatment accorded to Mr. Malloy and must be judged to have been appropriate in all of the circumstances. For the foregoing reasons, the grievance must be dismissed."*

The arbitrator essentially stated that because of the gravity of the offence and because another employee had been fired, then so should Mr. Rousseau. In fact, a short time later, the charges against the other three were withdrawn and the employees were reinstated in their former jobs.

Why was Mr. Rousseau treated differently? Why was he not also reinstated?

I say that because the BLE failed in its duty under section 37, Mr. Rousseau, one of its members, lost his job.

The union and only the union can seek judicial review. It knew the basis for the decision and was cognizant of the fact that arbitrator Picher was not fully aware of all the circumstances. This is certainly not a criticism directed at the arbitrator, but I do

feel that had he been fully aware of the circumstances, he may well have made a finding in Mr. Rousseau's favour.

I firmly believe that a breach of section 37 has taken place and that Mr. Rousseau did not receive fair treatment from his union. Accordingly, for the foregoing reasons, this application for reconsideration should be dismissed.

A handwritten signature in black ink, appearing to read 'P. H. Shafer', with a stylized, wavy line extending from the end.

Patrick H. Shafer  
Member of the Board



# information

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## Summary

Seafarer's International Union of Canada, *applicant*, and Seabase Limited, St. John's, Newfoundland, The Maersk Company Canada Ltd., St. John's, Newfoundland, and Rederiet A.P. Moller A/S, Copenhagen, Denmark, *employers*, and The Maersk Company Canada Ltd., and Seabase Limited, *interested parties*.

Board Files: 555-3972; 3973; 3998  
CLRB/CCRT Decision no. 1174  
August 6, 1996

Seafarer's International Union of Canada (SIU) filed three applications to be certified as bargaining agent for all unlicensed employees working on board the Canadian-flagged vessels Maersk Chignecto and Maersk Gabarus. SIU, unsure as to the identity of the true employer, filed applications for three potential employers.

Seabase argues that control of the employees for labour relations purposes rests with A.P. Moller. Both employers take the position that the Board has no jurisdiction to issue certification orders that have an extra-territorial scope; such orders must be based on the existence of a federal work, undertaking or business within Canada.

## Résumé

Syndicat international des marins canadiens, *requérant*, et Seabase Limited, St. John's (T.-N.), The Maersk Company Canada Ltd., St. John's (T.-N.), et Rederiet A.P. Moller A/S, Copenhagen, Danemark, *employeurs*, The Maersk Company Canada Ltd., et Seabase Limited, *parties intéressées*.

Dossiers du Conseil: 555-3972; 3973; 3998  
CLRB/CCRT Décision n° 1174  
le 6 août 1996

Le Syndicat international des marins canadiens (le Syndicat) a présenté trois demandes en vue d'être accrédité à titre d'agent négociateur de tout le personnel non breveté travaillant à bord des navires d'immatriculation canadienne Maersk Chignecto et Maersk Gabarus. Le Syndicat, incertain de l'identité de l'employeur véritable, a présenté une demande à l'égard de trois employeurs possibles.

Seabase prétend que A.P. Moller exerce un contrôle sur les employés aux fins des relations du travail. Les deux employeurs soutiennent que le Conseil n'a pas compétence pour rendre des ordonnances d'accréditation de portée extra-territoriale; de telles ordonnances ne s'appliquent qu'à des entreprises fédérales au sein du Canada.



The Board concluded that the employment relationship was controlled by A.P. Moller. It also concluded that it had jurisdiction since the Code can apply beyond the geographic boundaries of Canada where circumstances warrant, in this case a Canadian-flagged and crewed vessel, and where there is no evidence of conflict of laws.

The application as it affects A.P. Moller is granted.

Le Conseil conclut que les relations employeurs-employés relèvent de A.P. Moller. Il conclut également qu'il a compétence puisque le Code peut s'appliquer au-delà des frontières géographiques canadiennes lorsque les circonstances le justifient, dans le cas présent un navire dont l'immatriculation et l'équipage sont canadiens, et lorsqu'il n'y a pas de preuve de conflits législatifs.

La demande visant A.P. Moller est agréée.

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## Reasons for decision

Seafarers' International Union of Canada,

*applicant,*

*and*

Seabase Limited, St. John's, Newfoundland,  
The Maersk Company Canada Ltd., St. John's,  
Newfoundland, and Rederiet A.P. Moller A/S,  
Copenhagen, Denmark,

*employers,*

*and*

The Maersk Company Canada Ltd. and Seabase  
Limited,

*interested parties.*

Board Files: 555-3972  
555-3973  
555-3998

CLRB/CCRT Decision no. 1174  
August 6, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Patrick H. Shafer and David Gourdeau, Members. A hearing was held on March 5 and 6, 1996, at St. John's, Newfoundland.

### Appearances

Messrs. Brian Riordan, Counsel, and Michel Desjardins, Secretary-Treasurer, for the applicant;

Messrs. Augustus G. Lilly, Counsel, and Paul C. Locke, President & CEO, for the employers;

Mrs. Patricia J. Wilson, Counsel, assisted by Mr. Ole Hoeg, Executive Vice-President, for The Maersk Company Canada Ltd. and Rederiet A.P. Moller.

These reasons for decision were written by Mr. David Gourdeau, Member.

## I

The applicant, Seafarer's International Union of Canada (the "union"), filed three applications to be certified as the bargaining agent for all unlicensed employees working on board the Canadian-flagged vessels Maersk Chignecto and Maersk Gabarus, as well as on any future offshore supply vessels owned, operated, chartered, crewed or managed by the employer. The union, unsure as to the identity of the true employer, filed three applications. The first two, filed on November 10, 1995, named respectively Seabase Limited (Seabase), file no. 555-3972, and The Maersk Company Canada Ltd. (Maersk), file no. 555-3973, as the employer. The third application, filed on January 4, 1996, named Rederiet A.P. Moller A/S (A.P.Moller) of Copenhagen, Denmark, file no. 555-3998, as the employer. The applicant withdrew the Maersk's application during the hearing in view of the fact that Maersk Canada only bareboat charters vessels to A.P. Moller. The union, subsequent to the hearing, amended its two remaining applications by limiting their scope to all unlicensed employees working on board the Maersk Chignecto and Maersk Gabarus vessels. The Board allows the amendments.

The two potential employers contest the remaining applications.

Seabase contests the application on the grounds that the unlicensed employees are not employees of Seabase for the purposes of the Code, since control of the employees for labour relations purposes rests with A.P. Moller of Copenhagen, Denmark. Alternatively, Seabase argues its activities are not carried out in connection with a federal work, undertaking, or business as it functions as an employer for a foreign operator of supply vessels operating in the United Kingdom/Norwegian sectors of the North Sea beyond the jurisdiction of the Code.

For its part, A.P. Moller contests the application on the grounds that while the Board has jurisdiction to issue certification orders that have an extra-territorial scope, said orders must be based on the existence of a federal work, undertaking, or business within Canada. The employees in the proposed bargaining unit report for work outside Canada to vessels that operate in the United Kingdom/Norwegian sectors of the North Sea out of Aberdeen, Scotland. Although registered at St. John's, the vessels have only had a few temporary assignments in Canada since 1990 and, at present, there are no plans to use the Maersk Chignecto and Maersk Gabarus vessels in Canadian waters. Under the circumstances, A.P. Moller takes the position that the Board does not have jurisdiction.

## II

Maersk Canada owns the Maersk Gabarus and Maersk Chignecto vessels. A.P. Moller bareboat charters these two vessels from Maersk Canada. Seabase, pursuant to a crewing agreement with A.P. Moller, supplies licensed officers and full crews, including masters and chief engineers, for both vessels. These vessels have been flying the Canadian flag since 1994.

A.P. Moller's main activity is shipping. It operates 140 vessels, all under the Maersk name, worldwide.

Seabase, headquartered in St. John's, Newfoundland, provides support services to the marine industry. At all relevant times, its only client was A.P. Moller. It recruits and supplies crews to vessels operated by A.P. Moller out of Aberdeen, Scotland.

The crewing agreement between A.P. Moller and Seabase is a cost-plus agreement whereby A.P. Moller pays the cost of all wages, benefits, travel expenses, plus a certain percentage of the crewing cost as Seabase's compensation.

The two vessels operate under the Canada Shipping Act. Pursuant to that Act, all unlicensed personnel must sign on the vessels under Canadian Articles of Agreement. Under the crewing agreement, the crew must fulfil all the provisions necessary in order to obtain the Canadian Overseas Employment Tax Credit. According to both Seabase and A.P. Moller, this tax credit allows Canadian crews to be competitive in the world market.

Seabase stated that the unlicensed employees working on board the two vessels are its employees for the purposes of the Canada Income Tax Act, the Canada Pension Plan Act, the Canada Unemployment Insurance Act and the Newfoundland Workers' Compensation Act.

### III

Insofar as the issue of control for labour relations purposes is concerned, A.P. Moller's and Seabase's evidence is consistent. All hiring is controlled by A.P. Moller. In the case of masters and chief engineers, Seabase was originally provided with a list of masters and chief engineers acceptable to A.P. Moller and told who to assign to which vessel. After the initial placements, new recruits for these positions were flown to Europe to be interviewed by A.P. Moller personnel, with A.P. Moller making the final decision. In the case of all other crew positions, Seabase selects applicants and provides A.P. Moller with the necessary information on each individual, together with a recommendation. The final decision rests with A.P. Moller. It normally accepts Seabase's recommendation, but in some cases it has rejected said recommendation.

Since A.P. Moller is Seabase's only client, no unlicensed employees are hired by Seabase until A.P. Moller gives its approval.

The wages and all other terms and conditions of employment are set by A.P. Moller. The day-to-day direction and control of the crew rests with the master of the vessel who reports directly to A.P. Moller. The employment documents signed by the unlicensed personnel refer to A.P. Moller procedures. No unlicensed employee is suspended or dismissed without A.P. Moller's approval.

The standard employment contract for unlicensed employees provides for a six-month probation period. A.P. Moller supplies assessment forms that must be completed for each employee at the end of each eight-week tour of duty. The original form goes to A.P. Moller, with a copy to Seabase. A.P. Moller makes the final assessment of each employee and determines if the employment relationship will continue beyond the probation period. For masters and chief engineers, the assessment forms are completed by A.P. Moller personnel and, again, A.P. Moller's decision is final. Training, safety equipment and uniforms are all supplied by A.P. Moller. The uniforms bear A.P. Moller's identification.

In short, the employment relationship is controlled by A.P. Moller with Seabase as its personnel agent in Canada. This fact is not contested by either Seabase or A.P. Moller.

#### IV

Both Seabase and A.P. Moller argued that the work done on the Maersk Gabarus and Maersk Chignecto vessels does not constitute a federal work, undertaking or business within the meaning of sections 2 and 4 of the Code. Section 4 provides:

*"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."*

"Federal work, undertaking or business" is defined in section 2 of the Code as follows:

*"2. In this Act,*

*'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,*

*(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,*

*...*

*(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,*

*...*

*(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and*

*(j) a work, undertaking or activity in respect of which federal laws within the meaning of the Canadian Laws Offshore Application Act apply pursuant to that Act and any regulations made under that Act;..."*

Section 2 of the Code is based on sections 91 and 92 of the Constitution Act, which provide that the provinces do not have jurisdiction over shipping lines that extend beyond the limits of a province. As the matter in question clearly involves navigation and shipping that extend beyond the limits of any province, no provincial board can

assume jurisdiction. In normal circumstances, therefore, jurisdiction over the present application would clearly fall to the Canada Board by virtue of sections 2(a) and (c) of the Code.

However, Seabase and Maersk argued that the employees involved fall outside of Parliament's legislative authority for reasons that relate rather to the extra-territorial nature of the enterprise. For this reason, the phrase "within the legislative authority of Parliament" must be interpreted.

According to section 4 of the Code, for the Board to assert its jurisdiction, there must be a "federal work, undertaking or business" that is "within the legislative authority of Parliament." Much has been written about the definition of this term in relation to provincial jurisdiction. The case law beginning with Toronto Electric Commissioners v. Snider and Others, [1925] 2 D.L.R. 5 (C.P.), and culminating with Northern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115, sets out a complicated and fragile equilibrium between federal and provincial areas of jurisdiction. In the field of interprovincial transport, for example, complicated tests of frequency and purpose have been developed. By emphasizing the amount of time that the ships involved spent in Canadian waters, the employers in this case sought by analogy to apply these same tests. In the Board's opinion, however, the balance of power within the Canadian federal system between the federal government and the provinces has no bearing on the extent of the Board's jurisdiction in extra-territorial matters. Once it is clear that the activities involved are not provincial because they extend beyond the limits of a province (section 2(b) of the Canada Labour Code), for the purposes of the Code, they can only be federal by process of elimination. As such they will fall within the Board's jurisdiction, as they do here.

The relevant inquiry at this stage is no longer whether the activities come under the "legislative authority of Parliament" within the meaning of sections 91 and 92 of the

Constitution Act, but rather whether, pursuant to this phrase, in light of the intention of Parliament in enacting the Canada Labour Code, the Board can or should exercise jurisdiction according to the relevant principles of international law.

This Board has never had the occasion to fully canvass these principles, though they have been touched upon in several cases (See, notably, Canadian Offshore Marine Limited et al. (1973), 1 di 20; and 74 CLLC 16,089 (CLRB no. 3); Dome Petroleum Limited et al. (1978), 31 di 189; [1978] 2 Can LRBR 518; and 78 CLLC 16,153 (CLRB no. 153) and Bell Canada (1981), 43 di 86; and [1982] 3 Can LRBR 113 (CLRB no. 300)). The previous Canada Board, however, on several occasions, had the opportunity to explore the relevance of international law in the determination of its jurisdiction.

The previous Board was governed by the Industrial Relations and Disputes Investigation Act S.C. 1948, C.54 (IRDIA). The jurisdictional provision of the IRDIA (ss.53) is for our purposes identical to ss.2 and 4 of the present Code. In Iron Ore Transport Company Limited and Westriver Ore Transports Limited (1957), 57 CLLC 18,075 (Old CLRB no. 32), most notably, the Board chose not to exercise its jurisdiction under the IRDIA because the rules of international law - specifically the notion of international comity - dictated that it refrain from doing so. This was a case of a Canadian owned and directed shipping company which employed a British company to crew the ships with British sailors. The ships flew the British flag though they worked within Canada for a large part of the year. The Board concluded in the following terms:

*"The rules of International Law have a bearing on these questions and require consideration. In the first place, Canadian Law recognizes the rule of International Maritime Law that the nationality of a ship is determined not by the nationality of its owner but by the state in which it is registered and whose flag it flies. Under this rule these ships, therefore, are to be regarded as British*

*ships not Canadian ships. By Canadian as well as International Law Canadian courts have no jurisdiction over the ships and crews of other states except when they are within Canadian territorial waters. Again under International Law, recognized by Canada, one state through its courts or otherwise, for reasons of comity, may and usually does refuse to exercise jurisdiction over the ships and crews of another state while in the territorial waters of the first, in respect of many matters and particularly in respect of matters of internal management or discipline or relations between the master and crew. Labour relations are included within the terms 'internal management' and 'relations between master and crew'."*

(page 1645)

See also Western Union Telegraph Company (1949), 52 CLLC 16,609 (Old CLRB no. 9); Michigan Central Railroad Company, Canada Southern Division (New York Central Railroad, Lessee) and Wabash Railroad Company, Buffalo Division (1954), 52 CLLC 16,630 (Old CLRB no. 30); Commercial Cable Company (1957), 57 CLLC 18,095 (Old CLRB no. 33).

The applicable principles of international law referred to in Iron Ore, *supra*, have not changed. In order for the Board to assert jurisdiction in this case, it should have jurisdiction over the subject matter and must be able to enforce its orders against the persons who are their object. This point is set out in Kindred et al., International Law, Chiefly as Interpreted and Applied in Canada, 5th ed. (Toronto: Edmond Montgomery, 1993):

*"It is also necessary to keep in mind the difference between control of the objects, acts and events that may be complained of, in other words, the subject matter over which jurisdiction is asserted, and power over the actors, human or legal, who perpetrate the alleged wrongs. In order validly to prescribe and enforce its laws, a state must have jurisdiction over both the subject matter and the person involved."*

(page 424)

With respect to jurisdiction over Ships on the high seas, in the fourth edition of his work, Principles of Public International Law (Clarendon Press, Oxford: 1990), Ian Brownlie states the following:

*"The Convention on the High Seas of 1958 and the Law of the Sea Convention of 1982 affirm the general principle enunciated by the Permanent Court in the Lotus case: 'Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. '...'"*

(page 249)

Article 94 of the UN Convention on the Law of the Sea, codifying customary international law, sets out the duties of the Flag state in part as follows:

1. *Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*
2. *In particular every State shall:*
  - (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and*
  - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.*

It is beyond question that labour-relations legislation falls within the ambit of the "internal affairs" of the ship and that this law should ordinarily be governed by the law of the flag. Territorial jurisdiction might be asserted - this is in effect what the employers have argued for here - but the principle of international comity usually

prevents this in matters of "internal affairs" such as labour relations (see Iron Ore, supra). Thus the Board would have jurisdiction over the subject matter in question here, regardless of the port of call of the vessel. In Mercury Bell (1986) 27 DLR (4th) 641 at page 644, Marceau J.A., in a matter of conflict of laws, said the following in regard to the application of the Canada Labour Code to a Liberian flag vessel employing sailors from the Phillipines docked in a Canadian port:

*"There is no doubt that to determine the rights of seamen against the owners of the ship on which they are serving, which is the subject matter of the action, the law of the ship's port of registry is to be looked at. This is required by "the well-established rule of international law that the law of the flag state ordinarily governs the [internal] affairs of a ship" (McCulloch v. Sociedad Nacional de Marineros de Honduras (1962), 372 U.S. 10 at p. 21 (U.S. Sup. Ct., 1963)), a rule formally confirmed in s. 274 of the Canada Shipping Act, R.S.C. 1970, c. S-9, as amended, ...*

. . .

*That this action must be disposed of on the basis of the law of Liberia is therefore without question."*

(page 644)

A subsequent case in the trial division, Metaxas v. Galaxias, [1990] 2 F.C. 400, 35 F.T.R. 40 was even more explicit as to the policy rationale for this rule:

*"Altogether apart from the specific provisions of section 274 I feel that, because of the importance of encouraging commercial exchanges between nations and of the resulting importance of protecting and preserving the international character of shipping, where the rights of the crew are involved and where there exists any real doubt as to whether the law of the flag or that of the forum is to be applied, admiralty courts should, whenever possible, apply the law of the flag to determine the rights of the crew with regard to their employers for nothing can constitute a more essential or integral part of a ship than the crew which sails it. It would be unjust and unfair for the crews of ships to expect that their*

*conditions of employment and the compensation to which they would be entitled in the event of a breach of contract by the ship's owners or charterers, might vary with each port at which the vessel may call."*

(pages 406-407)

For the following reasons, therefore, the Board concludes that it has jurisdiction over the subject matter of the application before it.

First, as the Canadian cases point out, Parliament clearly intended for the Labour Code to apply beyond the geographic boundaries of Canada where circumstances warrant (e.g. airplanes). We can also presume that Parliament did not intend to violate the principles of international comity (see, for example, Iron Ore, supra).

Second, under international law, by virtue of the registration of the two vessels, Parliament clearly has jurisdiction over the labour relations of the two ships and their crew.

Third, no evidence of a possible conflict of laws has been presented in this case. Logically, the burden of proof rests with the party that alleges there is a conflict and asks the Board to deny its jurisdiction, in this case the employers. Where, as here, any conceivably applicable foreign law has not been established before the Board, the principles of private international law allow the Board to presume that the foreign law is the same as Canadian law (see Mercury Bell, supra). Given the results in Iron Ore, supra, any attempt at certification in Britain or Denmark would likely lead to a dismissal of the application. In fact, according to the evidence adduced, the employer's Danish flag ships are certified under Danish law and the employer's British flag ships are certified under British law. For this reason, it seems clear that the Board would not violate any principles of international comity by asserting its jurisdiction in this case.

With respect to the Board's jurisdiction over the parties in this case, the provisions of the Act may be enforced against all of the interested parties. The employees are Canadian and return to Canada after every voyage. The ships are owned by Maersk, and are bareboat chartered to Moller who continues to seek business in Canada and to utilize the tax benefits available from the Canadian government for the employment of Canadian crews. The ships, finally, fly the Canadian flag and are subject to the terms of the Canada Shipping Act R.S.C. 1970, c.S-9.

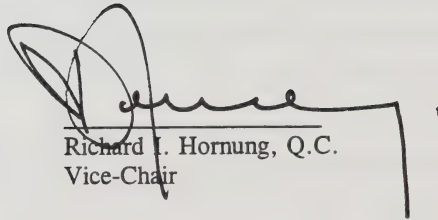
In terms of efficacy, Moller can bargain directly or through its chosen agent in Newfoundland, whether this be Seabase or another. The employer and the employees alike may enforce its terms through the same means.

For all these reasons, the Board determines that the enterprise in question is within the legislative authority of Parliament and that it has jurisdiction to certify the applicant.

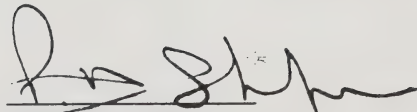
## V

Accordingly, as the Board has determined that the proposed unit is appropriate for collective bargaining and is satisfied that, as of the date of the application, a majority of the employees wish to have the applicant represent them as their bargaining agent, the Board hereby grants the certification application as it affects Rederiet A.P. Moller A/S (file no. 555-3998) for the following bargaining unit:

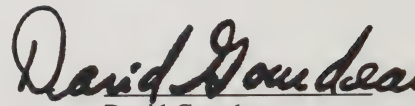
*"all unlicensed employees employed aboard Canadian flag vessels 'Maersk Chignecto' and 'Maersk Gabarus', excluding ship's officers, office employees and those persons automatically excluded by law."*



Richard I. Hornung, Q.C.  
Vice-Chair



Patrick H. Shafer  
Member



David Gourdeau  
Member

# Information

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## Summary

Canadian Union of Postal Workers, *complainant*, and Tanat Canada, a Division of G.D. Express Worldwide Canada Inc., carrying on business as TNT Express Worldwide, *respondent*.

Board Files: 745-5014  
745-5065  
745-5096  
555-3888

CLRB/CCRT Decision no. 1175  
August 9, 1996

## Résumé

Syndicat des travailleurs et travailleuses des postes, *plaignant*, et Tanat Canada, une division de G.D. Express Worldwide Canada Inc., exploitée sous la raison sociale TNT Express Worldwide, *intimée*.

Dossiers du Conseil: 745-5014  
745-5065  
745-5096  
555-3888

CLRB/CCRT Décision n° 1175  
le 9 août 1996



In this case, the complainant filed an application for certification pursuant to section 24 of the Canada Labour Code and three complaints alleging violation of sections 94(1)(a), 94(3)(a)(i) and 24(4) of the Code.

The employer dismissed two casual employees just prior to the completion of their probationary period, allegedly because of their unsatisfactory performance, as well as one of its permanent employees (the principal union organizer), allegedly because of his repeated failure to report for work. The Board finds that the employer's alleged motives were pretexts and that the employer did violate section 94(3)(a)(i) of the Code. In the circumstances, the Board finds it superfluous to make a finding with respect to the violation of section 94(1)(a).

Dans la présente affaire, le plaignant a présenté une demande d'accréditation en vertu de l'article 24 du Code canadien du travail et trois plaintes alléguant violation de l'alinéa 94(1)a), du sous-alinéa 94(3)a)(i) et du paragraphe 24(4) du Code.

L'employeur a congédié deux employés occasionnels juste avant la fin de leur période de stage, présumément en raison de leur rendement insatisfaisant, ainsi qu'un de ses employés permanents (l'organisateur syndical principal), présumément en raison de son omission répétée de se présenter au travail. Le Conseil estime que les motifs invoqués par l'employeur n'étaient que des prétextes et que l'employeur a violé le sous-alinéa 94(3)a)(i). Dans les circonstances, le Conseil juge superflu de trancher la question de la violation de l'alinéa 94(1)a).

After being notified of the application for certification, the employer imposed a static freeze of the conditions of employment and kept casual employees at work while its regular employees were sent home prior to completing their full weekly hours, a departure from normal practice. The Board finds that the employer did violate section 24(4) of the Code, makes no remedial order in the circumstances but retains jurisdiction to do so should it become necessary.

After deciding the employer breached section 94(3)(a)(i) and ordering the reinstatement of the employees, the Board certified the trade union as the bargaining agent since, after the application of section 3(2), a majority of the employees in the unit wished to have the trade union represent them as their bargaining agent.

Après avoir été avisé de la demande d'accréditation, l'employeur a imposé un gel des conditions de travail, a gardé au travail des employés occasionnels alors qu'il a renvoyé à la maison les employés permanents sans qu'ils aient terminé leur semaine de travail, ce qui s'écarte de la pratique habituelle. Le Conseil estime que l'employeur a violé le paragraphe 24(4); il ne rend pas d'ordonnance de redressement, mais se réserve le droit de le faire, s'il y a lieu.

Le Conseil, après avoir décidé que l'employeur avait enfreint le sous-alinéa 94(1)a)(i) et ordonné la réintégration des employés, a accrédité le syndicat à titre d'agent négociateur puisque, après l'application du paragraphe 3(2), une majorité des employés membres de l'unité désirait être représentée par cet agent négociateur.

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## Reasons for decision

Canadian Union of Postal Workers,

*complainant,*

*and*

Tanat Canada, a Division of G.D. Express  
Worldwide Canada Inc. carrying on business as  
TNT Express Worldwide,

*respondent.*

Board Files: 745-5014  
745-5065  
745-5096  
555-3888

CLRB/CCRT Decision no. 1175

August 9, 1996

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The Board consisted of Mr. J. Philippe Morneau, Vice-Chairman and Ms. Mary Rozenberg and Mr. Patrick H. Shafer, Members.

### Appearances:

Mr. Michael D. Wright, assisted by Ms. Cathy Carroll, Local President, for the complainant; and

Mr. Dirk Van De Kamer, assisted by Ms. Marlene Miller, Payroll/Personnel Manager for the respondent.

These reasons for decision were written by Mr. J. Philippe Morneau, Vice-Chairman.

I

The Board is dealing with three unfair labour practice complaints filed by Canadian Union of Postal Workers (CUPW, the complainant, the applicant or the union) against Tanat Canada, a Division of G.D. Express Worldwide Canada Inc., carrying on business as TNT Express Worldwide (Tanat, the respondent or the employer), and with the application for certification by CUPW seeking to be certified the bargaining agent for a unit of employees of Tanat.

The first complaint (Board file 745-5014) was filed on February 21, 1995 and alleged that the employer violated the provisions of sections 94(1)(a) and 94(3)(a)(i) when the employer terminated the employment of Robert Donnelly and Giselle Tubaro on November 25, 1994 just before the completion of their probationary period due on November 27, 1994.

The second complaint (Board file 745-5065) was filed on April 24, 1995 and alleged that the employer violated the provisions of sections 94(1)(a) and 94(3)(a)(i) when the employer terminated the employment of Mike Bravo, a permanent employee of Tanat and the key union organizer, on March 21, 1995, allegedly because of his failing to report his absence of March 20, 1995.

The third complaint (Board file 745-5096) was filed on May 26, 1995 and alleged that the employer violated the provisions of sections 24(4), 94(1)(a) and 94(3)(a)(i) in telling employees that

*"the company can not change any of the working conditions that were in place as of March 31, 1995 (filing date). This includes salary increases, benefits changes, for any of the employees in the proposed bargaining unit.",*

and in denying employees in the proposed bargaining unit their normal and regular hours and replacing them with temporary or casual employees on two occasions.

The application for certification (Board file 555-3888) was filed on March 31, 1995. CUPW seeks to be certified for all employees of Tanat Canada, a Division of G.D. Express Worldwide Canada Inc., carrying on business as TNT Express Worldwide, employed at or in the vicinity of Windsor, Ontario, excluding supervisors and those above the rank of supervisor, office, clerical and sales staff.

A hearing was held in Windsor on June 15, and 16, 1995 and July 24, 1995. At the outset of the hearing the parties were advised through their solicitors, that the Board would not be hearing any evidence with respect to the certification application but would make a determination based on the contents of the file and the submissions of the parties, in accordance with its normal practice, after having decided the complaints.

## II

During the hearing the Board heard evidence from six witnesses on behalf of the employer and five witnesses on behalf of the union. The witnesses for the employer were Ms. Alison Layfield, the Branch Manager in charge of the Windsor operation, Ms. Ruth Desjardins, a Lead Hand, Mr. Frank Garcia, the Operations Supervisor of day shift, Mr. Jeff Westray, the Operations Plant Manager, Ms. Julie Ann Pearn-Kemeny, the Canada Mail Service Manager of the employer and Ms. Marlene Miller, Payroll/Personnel Manager. The witnesses for the union were Ms. Giselle Tubaro, a probationary mail sorter and one of the complainants, Mr. Michael Bravo, a former lead hand mail sorter and one of the complainants, Mr. James Labelle, Mail Sorter and Mr. Robert Donnelly, probationary mail sorter and also one of the complainants.

The evidence can be summarized as follows.

Sometime during the early part of 1994, probably May, Michael Bravo started a union drive. He met with CUPW representatives and obtained from them material to start

a unionization drive at Tanat. The first organization meetings were held in October 1994 with a probable date of October 5 for the first meeting. Management became aware of the union organization drive sometime during the month of October 1994. During this period Michael Bravo on several separate days wore a union T-shirt at work. This was noticed by other employees and reported to management. In late October 1994, Mr. Bravo testified to meeting Mr. Jeff Westray at a restaurant and discussing the union. At that time, Mr. Bravo alleges, Mr. Westray offered him a promotion to get rid of the union and told him that he was a target to be fired for having worn a union T-shirt at work. Mr. Westray denies that this conversation ever took place although he does not deny meeting with Mr. Bravo. On November 3, 1994, Mr. Robert Donnelly received a warning letter for having been absent from work without permission. Mr. Donnelly insists that he was not absent from work without permission and testifies to having crumpled up this warning letter in front of Mr. Frank Garcia and said loudly that "he was going to go and sign up". Mr. James Labelle also recalled this conversation and in his view this said conversation had to be heard by Mr. Frank Garcia. Mr. Garcia denied ever hearing this statement.

On November 23, 1994 there was a union meeting held for the employees that the union seeks to represent. Probationary employees Tubaro and Donnelly attended this meeting. The meeting was also attended by the office staff of the company who for their part talked against the union and said they were not in favour of unionization. The office employees were not being sought by the union. At this meeting Giselle Tubaro signed her union card while the office staff were still in attendance. On November 25, 1994, Donnelly and Tubaro were terminated on the last day of their probationary period allegedly for failure to meet production standards.

It was at about this time that the union applied for certification to the Ontario Labour Relations Board for the bargaining unit in question here and also made complaints to that Board with respect to the termination of Donnelly and Tubaro. On the hearing for interim relief with respect to the complaints, the Ontario Labour Relations Board

decided, for reasons to follow, that the labour relations of Tanat fall within federal jurisdiction and on that basis that the Ontario Labour Relations Board was without jurisdiction to deal with the matter. The next day the union withdrew its certification application with leave of the Ontario Labour Relations Board.

As an aside, the reasons of the Ontario Labour Relations Board for that decision were issued on April 25, 1995. We have read these reasons with interest and we agree with the conclusion of the Ontario Labour Relations Board that Tanat is a federal undertaking by virtue of its integration within the business of G.D. Canada and TNT Mailfast.

Thereafter the union continued its organization campaign under the federal regime which eventually led to the filing of the application for certification herein and of the complaints.

On March 3, 1995, Mike Bravo had a meeting with Alison Layfield as a result of his failure to report for duty. Bravo testifies that he asked Alison Layfield why he was marked by management as a union leader. He testified that he received no response to this question. Alison Layfield for her part could not recollect that conversation.

On March 21, 1995, Mike Bravo was terminated allegedly for his failure to follow the company's attendance policy. On April 10, 1995, after having received notice of the filing of the application for certification herein, the employer instituted a so-called static freeze of conditions of employment by memorandum dated that day. This position was later reversed by the employer after consultation with its solicitor. On May 5 and 12, 1995, regular employees of the employer were sent home prior to having worked their full weekly hours while temporary employees were working along side and kept working.

III

The Code sections which are in question in these cases are as follows:

*"3. (2) No person ceases to be an employee within the meaning of this Part by reason only of his ceasing to work as the result of a lockout or strike or by reason only of his dismissal contrary to this Part. (emphasis added)*

...

*24. (4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until*

*(a) the application has been withdrawn by the trade union or dismissed by the Board, or*

*(b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit, except pursuant to a collective agreement or with the consent of the Board.*

...

*94. (1) No employer or person acting on behalf of an employer shall*

*(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or*

...

*(3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,*

...

*97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that*

*(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94 or 95; or*

...

*98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party." (emphasis added)*

#### IV

With respect to the complaint concerning Robert Donnelly and Giselle Tubaro, the employer essentially argues that it was acting in the ordinary course of business in not continuing the employment of probationary employees who proved unsatisfactory for permanent employment.

In connection with the termination of the employment of Mike Bravo, the employer submits that, because it knew that Mr. Bravo was involved with the union, it took special care to ensure that it had sufficient grounds for termination of his employment

before terminating his employment. Thus, it says, since it satisfied itself that it had sufficient grounds for termination, anti-union animus can have played no part in the decision to terminate him.

As to the complaint of violation of s.24(4), the employer admits that its original position of "static freeze" was incorrect but submits that it has since corrected this by implementing the business as usual approach favoured by the Board. It therefore submits that no remedial order is required in this matter.

For its part, the union submits that the employer has failed to meet the burden of proof imposed on it by section 98(4) of the Code to show that its actions were free of any anti-union animus. The union also submits that the credibility of the employer's witness is questionable in the circumstances and that this strengthens its argument. The union says it is not required to prove any anti-union animus on the part of the employer.

With respect to the alleged violation of section 24(4), the union submits that it has satisfied the onus of proof that the employer has violated s.24(4) of the Code and asks the Board to so declare. This is necessary it says because some of the employees' benefits had not at the time of hearing been resolved by the employer.

V

As stated previously, the Board concludes, based on the reasons of the Ontario Labour Relations Board, *supra*, and on the parties' admission, that the employer's business is a federal business and that the Board has jurisdiction in these matters.

It is not an uncommon occurrence, in this jurisdiction as well as in others, to have alleged employer unfair labour practices more or less coincident with union

organization drives. Most often, before this Board, such complaints allege violation of section 94(3) of the Code. It was no doubt because of their high incidence that the legislator saw fit to reverse the onus of proof in such cases as stated in s.98(4) of the Code.

One of the Board's leading cases in this area of the Code is Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82) where it is stated:

*"Legislation acknowledging rights of groups or individuals in society is usually enacted in response to a social environment in which persons seeking to assert those rights have been discriminated against. This is the case with modern human rights legislation and is certainly the history of labour relations legislation in Canada. Discrimination can be most subtly practised and labour relation boards' decisions are replete with examples of ingenious employer actions designed to thwart the exercise of employee's rights to participate in union activity. Persons who practice discrimination determined by society, through its legislators, to be an unwanted element of our social fabric should not be relieved from the remedies afforded those who are discriminated against because they can offer another reason for their act. The presence of a second or more reasons does not remove the taint of discrimination from their act. It does not engender a sense of equality or freedom in those whom the legislation seeks to protect. It does not encourage the social climate which the anti-discrimination legislation seeks to promote. Quite the contrary, it encourages deception, rewards the skillful manipulator in human relations and probably creates a more destructive form of discrimination. For those discriminated against statutory remedies become meaningless and self-help in many hostile or other undesirable forms becomes the only recourse.*

*In the employment context, there are practical reasons for the test enunciated by the Ontario High Court and Court of Appeal. The employment relationship is a continuous, often long term, relationship. As in all human relationships, it is often far from perfect with either party having cause for some dissatisfaction. At any point in time employers can often point to past or recent employee behaviour or inadequacies to justify a termination of or change in the terms of the relationship. (Indeed, at common law it*

*is an at-will relationship terminable without cause if adequate notice or pay in lieu of notice is given.) It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is one contemplated by section 184(3), he will be found to have committed an unfair labour practice."*

(pp. 284-285)

Further in Bank of Montreal (Carrall and Hastings Street Branch) (1980), 39 di 122

(CLRB no. 247), the Board stated:

*"While the procedure followed in complaint cases may result in lengthier hearings, evidence adduced by a respondent employer which is directed more at establishing the legitimacy of the stated reason for termination as being unrelated to the complainant's union activities will not necessarily be recited at great length in the Board's reasons for decision. The Board sees evidence, led for the purpose of establishing that the respondent's action against the complainant was within any applicable employment standard, as being for the limited purpose of rebutting an implied or stated allegation that the reason given for the discipline serves merely to mask the true cause or hide the respondent's anti-union motivation. The respondent does not have to establish just cause for dismissal before this Board and we do not treat evidence led in that direction in the same manner or for the same purpose as would an arbitrator. The Board expects in view of the substantive provisions of subsection 188(3) that the respondent will offer some reasonable and credible explanation of its action, not necessarily of sufficient weight to*

*provide a successful defence to an unjust dismissal case but a least sufficient to establish the existence of a cause or explanation other than, and to the exclusion of, a violation of the Code."*

(p. 128)

And in Cablevision du Nord de Québec Inc. (1988), 73 di 173 (CLRB no. 681), the

Board stated:

*"Thus, in order for the Board to dismiss the complaint, the employer must establish, through a preponderance of evidence, that its conduct was devoid of any anti-union animus. To satisfy the Board, the evidence adduced must be convincing and above all credible."*

(p. 176)

and

*"The employer will discharge the burden of proof if it establishes, through a preponderance of evidence, that its decisions, administrative or otherwise, were not pretexts or did not mask a wish to seize an opportunity to get rid of union supporters because of their militancy."*

(p. 177)

The Board therefore must examine the evidence having the above principles in mind. In this case, while the evidence of all witnesses was quite forthright with respect to the facts, the Board found that the witnesses on behalf of the employer which were testifying of their specific knowledge of the union organizing campaign and of the union supporters was somewhat tainted. The Board noted that, while all of the employer's witnesses had excellent memories with respect to the occurrence of events, they either did not recall or outright denied any knowledge of any union involvement of anyone specific with the exception of Mr. Michael Bravo.

While it is not easy to enunciate with absolute precision at which point or exactly where anti-union animus is present, it is usually fairly easy for the Board to determine its absence. It is done so when the employer has put before the Board clear, cogent, unambiguous, convincing and credible evidence which establishes that its decisions were founded on what it says they were founded on, and were not pretexts.

In this case, the employer has failed to satisfy the Board that its decisions to discharge Robert Donnelly, Giselle Tubaro and Mike Bravo were entirely devoid of anti-union animus. In the case of Donnelly and Tubaro, the recentness of the so-called "test" given to them, its secrecy, the demeanour of the witnesses, all lead the Board to this conclusion. In the case of Bravo, the severity of the punishment, the failure of anyone in management, most notably the Branch manager, Alison Layfield, to discuss this problem with Bravo, shows that management seized upon this opportunity "to get rid of a union supporter because of his militancy".

We therefore conclude that the employer has breached section 94(3)(a)(i) of the Code when it terminated the employment of Giselle Tubaro, Robert Donnelly and Mike Bravo in the circumstances of this case.

In light of the employer's admission, we also find that it breached the provisions of section 24(4) of the Code, this including on May 5 and on May 12, 1995 where, on each of these days, regular employees of the employer were sent home prior to having worked their full weekly hours while temporary employees were kept at work. It has been demonstrated to the Board that this was a departure from the business as usual method for this employer.

Having made the above findings with respect to the breach of section 94(3)(a)(i) by the employer, it is superfluous for the Board to make a finding with respect to the complaint of alleged violation of section 94(1)(a) of the Code and the Board will make no pronouncement relative thereto.

In connection with the certification application, the Board having concluded that the employees who have been dismissed in this case were dismissed contrary to section 94(3)(a)(i) of the Code, the said employees continue to be employees for the purpose of the application for certification by virtue of section 3(2). Thus, in treating the application pursuant to its normal practice, based on the contents of the file, the submissions of the parties, and having decided the complaints, the Board has determined that the unit that the trade union considers appropriate for collective bargaining and consisting of all employees of Tanat Canada, a division of G.D. Express Worldwide Canada Inc., carrying on business as TNT Express Worldwide, employed at or in the vicinity of Windsor, Ontario, excluding office, clerical and sales staff, supervisors and those above the rank of supervisors, constitute a unit appropriate for collective bargaining and, the Board is satisfied that, as of the date of the filing of the application for certification, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent. The Board shall therefore certify the trade union as the bargaining agent for the said bargaining unit.

The Board therefore makes the following declarations and orders:

1. Declares that the employer has violated section 94(3)(a)(i) of the Code by dismissing its employees Robert Donnelly, Giselle Tubaro and Mike Bravo.
2. Declares that the employer has violated section 24(4) of the Code by instituting a static freeze with respect to terms and conditions of employment and by failing to adhere to its business as usual with respect to the hours of work of its regular employees on May 5 and May 12, 1995.
3. Directs to employer to cease and desist violating the Code.
4. Directs the employer to reinstate the employees Robert Donnelly, Giselle Tubaro and Mike Bravo forthwith in the same positions they held prior to

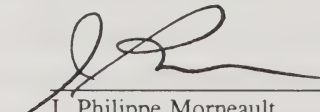
their dismissal, should they so wish, with the same terms and conditions of employment.

5. Directs the employer to compensate each of the employees Donnelly, Tubaro and Bravo for the amounts he or she would have earned from the date of dismissal to the date of reinstatement, if applicable, less any monies which he or she actually received during the said period, if applicable.
5. Certifies the applicant trade union as the bargaining agent for the bargaining unit.

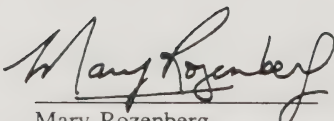
The Board appoints Mr. Jim Keatings, senior labour relations officer at its Toronto regional office, to assist the parties in the implementation of the said orders.

The Board makes no remedial orders with respect to the violation by the employer of section 24(4) of the Code but retains jurisdiction to do so should it become necessary to make such an order, and also retains jurisdiction to deal with any question which may arise with respect to the implementation of the above orders which the parties cannot resolve.

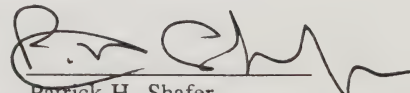
The Board has issued the attached Certification Order in both official languages.



J. Philippe Morneault  
Vice-Chair



Mary Rozenberg  
Member



Patrick H. Shafer  
Member

Canada  
Labour  
Relations  
Board  
  
Conseil  
Canadien des  
Relations du  
Travail

**IN THE MATTER OF THE**

Canada Labour Code

- and -

Canadian Union of Postal Workers,

applicant union,

- and -

Tanat Canada, a Division of G.D. Express Worldwide Canada  
Inc., carrying on business as TNT Express Worldwide,  
Mississauga, Ontario,

employer.


**WHEREAS** the Canada Labour Relations Board has received an application for certification from the applicant as bargaining agent for a unit of employees of Tanat Canada, a Division of G.D. Express Worldwide Canada Inc., carrying on business as TNT Express Worldwide, pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations);

**AND WHEREAS**, following investigation of the application and consideration of the submissions of the parties concerned, the Board has found the applicant to be a trade union within the meaning of the Code and has determined the unit described hereunder to be appropriate for collective bargaining and is satisfied that a majority of the employees of the employer in the unit wish to have the applicant trade union represent them as their bargaining agent.

**NOW, THEREFORE**, it is ordered by the Canada Labour Relations Board that the Canadian Union of Postal Workers be, and it is hereby certified to be, the bargaining agent for a unit comprising:

*"all employees of Tanat Canada, a division of G.D. Express Worldwide Canada Inc., carrying on business as TNT Express Worldwide, employed at or in the vicinity of Windsor, Ontario, excluding office, clerical and sales staff, supervisors and those above the rank of supervisor."*

**ISSUED** at Ottawa, this 9th day of August 1996, by the Canada Labour Relations Board.

  
J. Philippe Morneau  
Vice-Chairman



**CONCERNANT LE**

Code canadien du travail

- et -

Syndicat des travailleurs et travailleuses des postes,

syndicat requérant,

- et -

Tanat Canada, une division de G.D. Express Worldwide  
Canada Inc., exploitée sous la raison sociale TNT  
Express Worldwide,  
Mississauga (Ontario),

employeur.

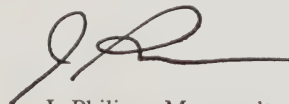
**ATTENDU QUE** le Conseil canadien des relations du travail a reçu du syndicat requérant une demande d'accréditation à titre d'agent négociateur d'une unité d'employés de Tanat Canada, une division de G.D. Express Worldwide Canada Inc., exploitée sous la raison sociale TNT Express Worldwide, en vertu de l'article 24 du Code canadien du travail (Partie I - Relations du travail);

**ET ATTENDU QUE**, après enquête sur la demande et étude des observations des parties en cause, le Conseil a constaté que le requérant est un syndicat au sens où l'entend ledit Code et a déterminé que l'unité décrite ci-après est habile à négocier collectivement et est convaincu que la majorité des employés dudit employeur, faisant partie de l'unité en question, veut que le syndicat requérant les représente à titre d'agent négociateur.

**EN CONSÉQUENCE**, le Conseil canadien des relations du travail ordonne que le Syndicat des travailleurs et travailleuses des postes soit accrédité, et l'accrédite par la présente, agent négociateur d'une unité comprenant:

*«tous les employés de Tanat Canada, une division de G.D. Express Worldwide Canada Inc., exploitée sous la raison sociale TNT Express Worldwide travaillant à partir de Windsor (Ontario) et sa proximité, à l'exclusion du personnel de bureau et de ventes, superviseurs et ceux de rang supérieur».*

**DONNÉE** à Ottawa, ce 9<sup>e</sup> jour d'août 1996, par le Conseil canadien des relations du travail.



J. Philippe Morneault  
Vice-président



# information

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## Summary

Brian E. Stevens, *applicant*, and Ontario Northland Transportation Commission, *employer*.

Board File: 950-308  
CLRB/CCRT Decision no. 1176  
August 9, 1996

## Résumé

Brian E. Stevens, *requérant*, et Commission de transport Ontario Northland, *employeur*.

Dossier du Conseil: 950-308  
CLRB/CCRT Décision n° 1176  
le 9 août 1996



These reasons deal with the referral of a safety officer's decision to the Board under section 129(5) of the Canada Labour Code.

The applicant, an employee of Ontario Northland Railway, invoked his right to refuse unsafe work on February 28, 1995. The subject matter involved protection around a maintenance pit near an assigned work area. The applicant maintained that a proper investigation under section 129(1) did not take place.

The issues involved were the subject of discussion between the employer and union, and a matter of a previous work refusal affecting the employer and the applicant.

The safety officer received notification from the employer that a work refusal was invoked. Section 129(1) places an obligation on a safety officer to investigate, upon receipt of notification of a work refusal from either party, the matter in the presence of the employer and the employee, or the employee's representative. The safety officer carried out an investigation.

La présente décision traite du renvoi au Conseil d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code canadien du travail.

Le requérant, un employé d'Ontario Northland, a invoqué son droit de refuser d'effectuer un travail dangereux le 28 février 1995. Il était question de protection près d'une fosse d'entretien à proximité d'un lieu de travail. Le requérant soutient qu'il n'y a pas eu d'enquête au sens du paragraphe 129(1).

Les questions en cause ont fait l'objet de discussions entre l'employeur et le syndicat ainsi que d'un autre refus mettant en cause l'employeur et le requérant.

L'agent de sécurité a été avisé par l'employeur qu'un employé avait invoqué son droit de refuser de travailler. Aux termes du paragraphe 129(1), un agent de sécurité doit, sur réception d'un avis de refus de travailler donné par l'une des parties, faire enquête en présence de l'employeur et de l'employé, ou d'un représentant de l'employé. L'agent de sécurité a mené une enquête.

Canada  
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Relations  
Board  
Conseil  
canadien des  
relations du  
travail

Having considered the circumstances of this case, nothing in the evidence led the Board to conclude that any important or relevant elements were overlooked, or improperly considered by the safety officer with respect to his investigation into the applicant's work refusal.

Après avoir examiné les circonstances de l'affaire, rien dans la preuve n'amène le Conseil à conclure qu'un élément important ou pertinent n'a été omis ou mal compris par l'agent de sécurité en ce qui a trait à l'enquête sur le refus de travailler du requérant.

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## Reasons for decision

Brian E. Stevens,

*applicant,*

*and*

Ontario Northland Transportation Commission,

*employer.*

Board File: 950-308

CLRB/CCRT Decision no. 1176

August 9, 1996

The Board was composed of Ms. Mary Rozenberg, Board Member, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Health and Safety). This matter was referred to the Board on March 21, 1995. A hearing was held on April 4, 1995 in Toronto.

These reasons for decision were written by Ms. Mary Rozenberg, Board Member.

### Appearances

Mr. Brian Stevens, on his own behalf; assisted by Mr. George Botic, CAW National Health and Safety Representative;

Mr. Ronald Béland, Safety Officer at Human Resources Development Canada; assisted by Mr. David Horrox, District Manager, Ontario Region for Human Resources Development Canada; and

Mr. Murray Rose, Safety Officer at Ontario Northland Railway; assisted by Mr. Martin Minor, Supervisor at Ontario Northland Railway.

These reasons deal with the referral to the Board of a safety officer's decision pursuant to section 129(5) of the Code. This referral arose from a refusal to work

exercised by Mr. Brian Stevens, an employee of Ontario Northland Railway, on February 28, 1995.

On March 17, 1995, Mr. Stevens requested that the safety officer refer his decision to the Board. He made the following three claims: the safety officer did not properly investigate the work refusal of February 28, 1995; the safety officer took a position that was different from a previous decision he issued on November 1, 1994; and the safety officer based his decision on the conditions of the work place at the time of his investigation and not at the time of the work refusal.

### **The Work Refusal**

On February 28, 1995, Martin Minor, supervisor, requested that Brian Stevens finish disassembling valves and clean up the air brake tear down bench area at track #3 at approximately 12:40 hours. At this time, the pit at track #3 was partially covered by a caboose (also called a van). Although this van covered the area closest to Mr. Stevens' immediate work area (the east end of the pit), the west end of the pit was open. Mr. Stevens advised Mr. Minor that he was refusing to do the work because of the open pit. The supervisor notified Ted Hargrave, CAW Local 103 Health and Safety Representative, of the refusal at approximately 13:00 hours. Mr. Hargrave went to Mr. Stevens' work area. At approximately 13:05 hours, Mr. Minor arranged to have the van removed and to have a box car placed over the whole pit. Mr. Minor then asked Mr. Stevens to do the work. Mr. Stevens again refused, indicating that the problem had not been corrected and that his refusal had not been properly or adequately addressed. He insisted on a ruling from Labour Canada regarding the protection of floor openings.

Mr. Martin called Mr. Trevor Prescott, supervisor and employer representative on the joint health and safety committee, to the area of the work refusal for the purpose of conducting an investigation. Initially Mr. Prescott did not recognize Mr. Hargrave as the union's official health and safety representative and requested the presence of

a specific union member on the joint health and safety committee; however, that member was not available. Mr. Prescott then recognized Mr. Hargrave as Mr. Stevens' health and safety representative for the investigation. They conducted the investigation in accordance with section 128(7) of the Code.

At approximately 13:50 hours, Messrs. Prescott and Hargrave left the area to discuss the refusal, and review the results of their investigation. They also reviewed the ruling made by Mr. Béland as a result of a previous work refusal invoked by Mr. Stevens on October 28, 1994. This directive, dated November 1, 1994, makes reference to sections 2.4(2), 2.5(1) and 2.5(4) of the Occupational Health and Safety Regulations, which read as follows:

*"2.4(2) Where an employee has access to a wall opening from which there is a drop of more than 1.2 m or to a floor opening, guardrails shall be fitted around the wall opening of floor opening or it shall be covered with material capable of supporting all loads that may be imposed on it.*

...

*2.5(1) Where an employee has access to an open top bin, hopper, vat, pit, ... the enclosure shall be*

*(a) covered with a grating, screen or other covering that will prevent the employee from falling into the enclosure; ...*

...

*(4) Every open top bin, hopper, vat, pit, ... shall be*

*(a) covered with a grating, screen or other covering;*

*(b) fitted with a guardrail; or*

*(c) guarded by a person to prevent employees from falling into the enclosure."*

*(emphasis added)*

This directive also stated:

*"A pit is not a hazard unless it is open. A pit that has its opening covered by a vehicle is not a hazard to an employee toward falling into it.... A covered pit is not a hazard."*

Mr. Hargrave took the position that the safety officer's November 1, 1994 directive was not followed, and supported Mr. Stevens' work refusal. Mr. Hargrave returned to the work site at approximately 14:05 hours. Mr. Prescott and Mr. Minor returned to the work site at approximately 14:55 hours. A few minutes later, Mr. Minor sent Mr. Stevens home with pay pending an investigation.

Safety officer Béland received three phone calls from Ontario Northland Railway on February 28, 1995. The first two calls were from Mike Restoule, Labour Relations Manager, and Tom Burton, Chief Mechanical Officer, at approximately 14:30 hours. Both advised the safety officer that Brian Stevens was refusing to work pursuant to section 128; they were just trying to keep him up to date. The third phone call was from Mr. Prescott at approximately 15:00 hours, advising the safety officer that a refusal was in progress and that the employee was sent home with pay. Mr. Prescott requested the presence of the safety officer. Arrangements were made with the safety officer to be at the work site on March 1, 1995 at approximately 13:00 hours. The safety officer advised the employer to have the supervisor and members of the joint health and safety representatives available. He stated that Mr. Stevens did not have to be present during the investigation as long as an employee representative was available.

#### **The Safety Officer's Investigation**

The safety officer discussed this work refusal with his supervisor, David Horrox, as he did not know if he should conduct a work-refusal investigation in accordance with

section 129 or a work-place investigation in accordance with section 141. Because of the employer's position in previous work refusals over Labour Canada's authority to investigate work refusals, David Horrox discussed this work refusal with the Ontario Ministry of Labour (OML). The OML believed that the work-site visit should be handled as an employer counselling session, while David Horrox believed that the visit should be handled as a work-refusal investigation.

The safety officer met Trevor Prescott at the work place on March 1, 1995 as arranged. They went to the work site, i.e. the bench area near pit site #3, to investigate the refusal. In the area were Health and Safety Committee employee representatives Ted Hargrave and Norm Chirone. They both questioned the safety officer's presence because neither Brian Stevens nor the union had requested his presence. The safety officer advised them that he had received a phone call from the employer and explained that, under Labour Canada's operating procedures directives, he could act on a refusal to work on receipt of a call from any party. The representatives insisted the matter was not a work refusal but rather an internal matter involving the employee and the company. The safety officer stated that at their request, the investigation would be conducted as an employer counselling session.

The safety officer viewed the bench area and the pit at track #3. At the time of this investigation, the pit was covered by a box car. The safety officer was advised that at the time of Mr. Stevens' work refusal a different type of car (caboose) was over the pit, but did not completely cover the area. The safety officer took photographs of the pit site from the area that Mr. Stevens was working in at the time of his work refusal. He measured the area. The portion of the pit that was covered measured 12' 10" (in a straight line) and the portion of the pit that remained open measured 18' (in an angled line). Discussions ensued about the issue of pit protection: a) the issue had been discussed at length at a previous work-refusal investigation conducted on October 28, 1994 as a result of Mr. Stevens' refusal to work; b) section 2.4(2) of the Occupational Health and Safety Regulations; c) section 2.5(1) of the Occupational

Health and Safety Regulations; d) the Arnone Transport decision #93-103 (a Labour Canada decision dealing with those short periods of time when vehicles are moved into and out of the garage and the pit is open); and e) the fact that there is no history of an injury as a result of an employee falling into an open pit while working near a pit area (three years ago, an employee who was working underneath a car in a pit slipped off the grating in the pit). The safety officer found that there was no hazard because the pit opening was covered by a car. The union representatives did not consider the car over the pit as protection in compliance with section 2.4(2) of the Occupational Health and Safety Regulations.

The union representatives showed the safety officer a second pit area. This pit had rope protection 24" high around the pit. The safety officer did not consider this adequate protection and suggested that it be raised to the height specified in the Code. The union representatives also showed the safety officer a third pit area in the welding shop. The safety officer suggested that this pit be protected when not in use.

Mr. Stevens placed a phone call around 9:30 a.m. to the Labour Canada Sudbury office to speak to Mr. Béland on March 1, 1995. Since Mr. Béland was not available, Mr. Stevens left a message notifying Mr. Béland of a work refusal and requesting an investigation pursuant to section 129(1). Mr. Stevens also faxed a letter to Mr. Béland's office at 13:29 hours.

On the safety officer's return to his office, there was a telephone message and a fax from Brian Stevens waiting for him. The letter stated that the work refusal began at 12:40 p.m. on February 28, 1995 and was reported to the immediate supervisor at that time. This letter further stated that investigations had taken place; however, as Mr. Stevens believed that the danger persisted, he was requesting an investigation pursuant to section 129(1).

The safety officer called his supervisor, David Horrox, and technical advisor Page. When these discussions began it was felt that the safety officer should return to the work site to investigate the work refusal in Mr. Stevens' presence.

On March 2, 1995, the safety officer spoke to Mr. Stevens on the telephone. They talked about the safety officer's return to the work site to conduct an investigation pursuant to section 129(1). Mr. Béland phoned Mr. Prescott to request that he be advised when Mr. Stevens returned to work.

On March 5, 1995, Mr. Stevens faxed another letter to the safety officer to confirm the March 2, 1995 conversation. In this letter, he advised the safety officer that he had returned to work on March 3, 1995 and was available to participate in the section 129 investigation.

After further discussion between Mr. Béland and Mr. Horrox on March 6, 1995, it was decided that since the safety officer had just been to the work site to undertake an investigation, had inspected and measured the area, and had taken photographs, it was not necessary to return yet again. This decision was communicated to Mr. Stevens by telephone. Mr. Stevens insisted that this work refusal was different because the previous ruling stated "a covering" and in his opinion a vehicle does not constitute a covering. On March 6, 1995, the safety officer also faxed to Mr. Stevens a refusal to work registration form with the comment "as per our discussion - please complete section 12 and then sign in appropriate box & return to me - thank you." Section 12 of that form is the statement of refusal to work section. Mr. Stevens signed and dated the employee's request section March 1, 1995 and included a notation "see letter of March 7, 1995".

Mr. Stevens faxed to the safety officer a letter dated March 7, 1995 to accompany the refusal to work registration form. In this letter he stated that he was reluctantly returning the signed refusal to work registration form. He was concerned because the

employer had not requested an investigation under section 129(1). Although the form indicated that Mr. Prescott had signed the form on behalf of the employer, Mr. Stevens stated that this was not so. Additionally Mr. Prescott's report reflected the employer's position that there was no work refusal in progress at any time. It was understood that the safety officer's availability to visit the work site was purely for consultation purposes and not to conduct a section 129(1) investigation. Mr. Stevens again requested that a section 129(1) investigation be conducted.

On March 7, 1995, the safety officer sent Ted Hargrave, the employee representative, a letter confirming the discussions of March 1, 1995 at the Ontario Northland Railway shop pertaining to Mr. Hargrave's position and questions concerning the safety officer's presence at the site to conduct an investigation when neither Mr. Stevens nor his representatives had called for the safety officer. This letter also addressed the discussions around the definition of cover over the pit. Mr. Béland confirmed that to be on the side of caution he would act on notification from either party with respect to the first question. And, with respect to the second question, Mr. Béland stated that a pit was not a hazard unless it was open. A pit that was covered by a vehicle was not a hazard to an employee.

On March 8, 1995, the safety officer sent Mr. Stevens' March 7 letter to Mr. Horrox with a request as to how to respond. After further discussions between Mr. Béland and Mr. Horrox, it was decided that there would be no return visit to the work site, since an investigation had already been conducted and another investigation would only duplicate the investigation process.

On March 10, 1995, Mr. Béland responded to Mr. Stevens' March 7 letter, which constituted the safety officer's report and findings of his investigation of the February 28, 1995 work refusal. Mr. Béland stated that the work site was inspected on March 1, 1995 at the employer's request and the fact that Mr. Stevens' request for a section 129 investigation came during or immediately after the inspection does not alter the

fact that the findings would not substantiate a refusal to work. Mr. Stevens was advised that a safety officer must assess the work site at the time of his inspection not as it was at the time of the refusal. The safety officer stated that the fact that a vehicle covered the pit at the time of his inspection rendered the pit area safe as per the regulations. He told Mr. Stevens that he was at liberty to appeal the decision. This letter was faxed to Mr. Stevens and to Mr. Prescott. The letter was also sent to Mr. Stevens by mail.

On March 17, 1995, Mr. Stevens requested that the safety officer refer his March 10, 1995 decision to the Board in accordance with section 129(5) of the Code. In his letter requesting referral, Mr. Stevens alleged that the safety inspector had not properly investigated the February 28, 1995 work refusal. He claimed that the inspector took a different position from an earlier (November 1, 1994) decision. He submitted that the inspector based his decision on the conditions at the time of his investigation of the work site and not at the time of the refusal.

### Submissions

#### Safety Officer's Submissions

The safety officer submitted that the refusal to work process under Part II of the Code is a two-step process. At the first step, the employer attempts to resolve the situation or condition that is prompting the employee to exercise his right to refuse. If the employer is successful, then the work refusal ceases. If the employer is unsuccessful and the employees continue to exercise their right to refuse unsafe work, a call is placed to Labour Canada requesting a safety officer to investigate. On receipt of a call from either party, the safety officer can act in accordance with Labour Canada operating procedures.

The safety officer further submitted that he is required to investigate and assess the situation at the time of his investigation. If the situation changed between the work

refusal and the safety officer's investigation, the safety officer would be so advised. However, his decision is based on the facts at the time of investigation.

Nothing in the Code requires a safety officer to render his decision right then and there. The safety officer can consult with other authorities and make a decision at a later date.

### **Applicant's Submissions**

Mr. Stevens submitted that open pit protection has been an issue at Ontario Northland Railway for a number of years. The safety officer instructed the employer to comply with regulation 2.4 in a previous work refusal. Although there have been made efforts to resolve the issue, the issue remains unresolved. The employer failed to comply with section 2.4(2) of the Occupational Health and Safety Regulations and with Labour Canada's November 1, 1994 directive issued as a result of an investigation of a previous work refusal.

Mr. Stevens considered that the investigation undertaken by the safety officer was insufficient and did not constitute a proper investigation in accordance with section 129(1) of the Code. The car in the photograph was not the same car that covered the pit at the time of the refusal. The safety officer had taken a photograph of another employee, as Mr. Stevens was not available. There is no evidence of the employee doing any actual work in the area. The safety officer, he claimed, was not familiar with the tools or the work area; failed to examine how an employee would be working in that area of the pit; and to observe the external forces at play at the time of Mr. Stevens' refusal. At the time of the safety officer's visit and investigation on March 1, 1995, neither Mr. Stevens nor the union had requested an investigation pursuant to section 129(5) of the Code.

Mr. Stevens submitted that the Arnone Transport decision mentioned above is relevant to the issue involved in the February 28, 1995 refusal. The pit at track #3 is a maintenance pit that is unprotected, and it is dangerous to leave a pit unprotected. A car over the pit is not considered to be protection for the maintenance pit. The pit is generally more vacant than it is covered.

Mr. Stevens asked the Board who has the power to terminate a work refusal. He claimed that the employer took the position that it could terminate such a refusal. He also claimed that when he continued to exercise his right to refuse under section 128(6), he was promptly removed from service pending disciplinary investigation for unjustified work refusal.

Mr. Stevens asked the Board to consider whether or not his refusal to work was properly investigated by the safety officer. He contended that a proper investigation under section 129(1) had not taken place.

### **Board's Decision**

Sections 128 and 129 of the Code were established to allow individuals to withdraw from danger as defined by the Code. It is recognized that there is a certain degree of danger in most occupations and that a risk of injury or inherent danger varies from industry to industry. Danger within the meaning of section 122(1) of the Code must be immediate and real. The risk to employees must be serious to the point where the machine or thing or the condition created may not be used until the situation is corrected. A possibility of injury or potential for danger is not sufficient to invoke the work refusal provisions (Antonia Di Palma (1995), 98 di 161 (CLRB no. 1131)). These provisions cannot be used as a vehicle for resolving labour issues or for promoting other agendas. Where work refusals coincide with other labour relations issues, the Board will pay particular attention to the circumstances of the refusal.

The Board's jurisdiction with respect to a referral of a safety officer's decision under section 129(5) is set out in section 130(1) of the Code. The Board's inquiry into the existence of danger is limited to examining the circumstances of the safety officer's decision and the reasons therefor. The Board must direct itself to the nature and to the sufficiency of the consideration the safety officer gave to the existence of danger at the time of his investigation and the safety issues involved in the work refusal. The Board's attention is focused to reconstruct what the safety officer encountered during the course of the investigation. The Board must then determine whether the safety officer was correct in finding that no danger existed at the time of his investigation (Antonia Di Palma, supra; and Dennis C. Atkinson (1992), 89 di 76 (CLRB no. 958)).

The Board has previously underlined that its role is not to tell the safety officer how to proceed with respect to conducting investigations into work refusals or with any other services relating to health and safety matters. Nor does the Board have any sort of general supervisory authority over safety officers or Labour Canada. (Antonia Di Palma, supra; Dennis C. Atkinson, supra; Denis Gagnon (1986), 65 di 137 (CLRB no. 572); and Gilles Lambert (1989), 78 di 69 (CLRB no. 748)).

The Federal Court of Appeal has said that when safety officers undertake an investigation of a work refusal, they must focus and determine whether a danger exists to an employee at the time they conduct their investigation - not at the time of the employee's initial refusal to work. This court has also said that when reviewing a safety officer's decision, the Board is restricted to determining whether a danger existed at the time of the investigation by the safety officer. See Bidulka v. Canada (Treasury Board), [1987] 3 F.C. 630; and Canada (Attorney General) v. Bonfa (1989), 73 D.L.R. (4th) 364; and 113 N.R. 224 (F.C.A.).

The issue of pit protection has been considered by the employer and the union, and certainly by the employer and Mr. Stevens. The OML had conducted at least one

investigation and issued an investigation report stating that yellow paint markings on the floor around the pit were acceptable. Labour Canada had also conducted an investigation (with the assistance of the OML) and issued an investigation report stating that the employer was required to comply with section 2.4(2) of the Occupational Health and Safety Regulations.

The Board reminds the parties that under Part II of the Code **both employees** (section 126(1)) **and employers** (sections 124, 125 and 126(2)) **have responsibilities and obligations to take all reasonable and necessary precautions to ensure** the safety and health of employees in the work place. Various rights and obligations arise along the way during the refusal process. A safety officer is not a pawn for either employers, employees, or unions in work-place disputes.

In accordance with section 128(7) of the Code, on receiving a report of a work refusal, the employer must conduct an investigation in the presence of the employee and at least one non-management member of the safety and health committee, or a safety representative, or a person selected by the employee. Such an investigation was undertaken. Where, after this investigation, the employee continues to refuse to work, the employer and the employee shall forthwith notify a safety officer. Mr. Prescott notified Mr. Béland of a work refusal. Mr. Stevens waited until the following morning to notify a safety officer of a work refusal. By waiting until the following morning, Mr. Stevens was not as "forthwith" as he should have been.

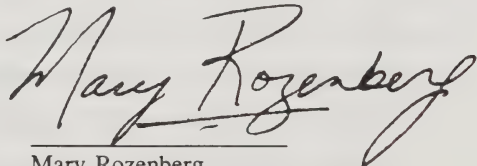
Section 129(1) of the Code places an obligation on a safety officer to investigate, upon receipt of notification of a work refusal from either party, the matter in the presence of the employer and the employee or the employee's representative.

The safety officer received notification from the employer that a work refusal was invoked. He carried out an investigation on March 1, 1995, and considered all

relevant matters and facts surrounding Mr. Stevens' February 28, 1995 work refusal. Mr. Stevens' interests were represented by Messrs. Hargrave and Chirone.

Section 129(5) provides that where a safety officer makes a finding of "no danger," an employee is not entitled under section 128 to continue to refuse. See Anthony W. Amor (1988), 75 di 202 (CLRB no. 717); and Christine Nugent (1982), 47 di 72; and [1982] 1 Can LRBR 416 (CLRB no. 360).

Having considered the particular circumstances of this referral, nothing was adduced that would lead the Board to conclude that any important or relevant elements were overlooked, or improperly considered by the safety officer with respect to his investigation into Mr. Stevens' work refusal on February 28, 1995. The Board therefore confirms the safety officer's decision.

A handwritten signature in black ink, reading "Mary Rozenberg". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

Mary Rozenberg  
Member







